IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 156

CLAYTON S. KRAMER, *Petitioner,*

v.

CARIBBEAN MILLS, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Plaintiff's First Amended Petition, Filed Feb. 9, 1965	2
Defendant's First Amended Answer, Filed May 3, 1966	6
Defendant's Motion to Dismiss, Filed May 3, 1966	10
Order Overruling Defendant's Motion to Dismiss	12
Plaintiff's Exhibit No. 4—The Assignment of Sept. 21, 1964	13
Defendant's Exhibit No. 1—The Agreement of Sept. 21, 1964	15
Defendant's Exhibit No. 2—Letter dated Sept. 23, 1964	17
Defendant's Exhibit No. 3—Contract between Clayton S. Kramer and Mock, Banner & McIntosh	18

Washington, D. C. · THIEL PRESS · 202 · 393-0625

INDEX (Cont'd):

Page

Defendant's Motion to Compel Plaintiff to Answer Questions Propounded to him during Deposition 20

Transcript of Proceedings:

Testimony of Clayton S. Kramer, Witness on Behalf of Plaintiff–

Direct Examination 23, 68

Cross Examination 30

Re-Direct Examination 60

Re-Cross Examination 61, 64

Excerpts from Oral Depositions:

Deposition of Arthur Haas, By Mr. Banner–

Direct Examination 70

Deposition of Walter M. Spradley, By Mr. Mock–

Direct Examination 73

Deposition of Clint Murchison, Jr., By Mr. Banner–

Direct Examination 75

Judgment, Filed July 6, 1966 77

Opinion of Court of Appeals, Filed Jan. 26, 1968 82

Judgment of Court of Appeals, Filed Jan. 26, 1968 100

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 9, 1964 – Plaintiff Kramer's original petition filed in U.S. District Court for Northern District of Texas, Wichita Falls Division.

Dec. 18, 1964 – Plaintiff's motion for voluntary dismissal granted and action ordered dismissed without prejudice to refiling complaint.

Dec. 18, 1964 – Order entered permitting plaintiff to file an amended complaint.

Feb. 5, 1965 – Plaintiff's first amended petition filed.

June 14, 1965 – Order entered overruling motion of defendant, Caribbean Mills, Inc., to dismiss for lack of jurisdiction over person of defendant and to quash return of service of summons.

July 1, 1965 – Defendant's original answer filed.

Sept. 2, 1965 – Order entered sustaining defendant's motion to transfer action to Dallas Division of the Northern District of Texas, on grounds of venue.

May 3, 1966 – Defendant's first amended answer filed.

May 3, 1966 – Defendant's motion to dismiss filed, asserting *inter alia* lack of jurisdiction by reason of a violation of 28 U.S.C. § 1359.

May 20, 1966 – Order entered overruling defendant's motion to dismiss.

May 25, 1966 – Jury trial of action commenced.

May 27, 1966 – Court's charge to the jury, and verdict of the jury in favor of the plaintiff.

July 6, 1966 – Judgment of District Court entered, awarding plaintiff judgment in the sum of $165,000, plus interest and costs.

July 15, 1966 – Defendant's notice of appeal filed.

Jan. 26, 1968 – Opinion and judgment of the Court of Appeals for the Fifth Circuit.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

CLAYTON S. KRAMER,
Plaintiff

v.

CARIBBEAN MILLS, INC.,
Defendant

C.A. No. 3-1168

PLAINTIFF'S FIRST AMENDED PETITION

Filed Feb. 9, 1965.

To the Honorable Judge of said Court:

Now comes Clayton S. Kramer, hereinafter called Plaintiff, complaining of Caribbean Mills, Inc., hereinafter called Defendant, and with leave of Court first had and obtained, files this his first amended complaint, and for cause of action would show unto the Court and jury as follows.

I.

Clayton S. Kramer is a citizen and resident of the State of Texas and lives and resides in Wichita Falls, Wichita County, Texas, which is in the Wichita Falls Division of the United States District Court for the Northern District of Texas.

Caribbean Mills, Inc. is a foreign corporation organized and existing under the laws of the country of Haiti. It has a place of business in Dallas, Texas, and it may be served with citation herein by serving its vice president, Walter M. Spradley, at the office of Jenkens, Anson, Spradley & Gilchrist at 1201 Main Street, Dallas, Texas.

II.

This is a suit for debt brought by the Plaintiff as against the Defendant herein arising out of contracts in writing dated on or about June 4, 1959.

On or about said date Caribbean Mills, Inc. executed a certain agreement with one Roy B. Kelly of Washington, D. C., and Panama and Venezuela Finance Company, a Panamanian corporation, whereby Roy B. Kelly and Panama and Venezuela Finance Company agreed to deliver to Caribbean Mills, Inc. certain shares of stock held by them which constituted obligations of Caribbean Mills, Inc., to the said Caribbean Mills, Inc., and to relinquish to the said Caribbean Mills, Inc. a continued "economic interests" in the assets of said Caribbean Mills, Inc.

Caribbean Mills, Inc., in turn, agreed to pay Roy B. Kelly and Panama and Venezuela Finance Company at such place as they jointly should designate, the sum of Two Hundred Fifty Thousand and No/100 Dollars ($250,000.00). Eighty-Five Thousand and No/100 Dollars ($85,000.00), of the Two Hundred Fifty Thousand and No/100 Dollars ($250,000.00) consideration, agreed to be paid was paid by the Defendant at the time of the closing of such agreement. The balance of One Hundred Sixty-Five Thousand and No/100 Dollars ($165,000.00) was to be paid in twelve (12) annual installments in the amount of Thirteen Thousand Sev-

en Hundred Fifty Dollars and No/100 Dollars ($13,750.00) each, the first of such installments to be due and payable on June 1, 1962, and a like installment to be due and payable on June 1 each year thereafter until the full sum of One Hundred Sixty-Five Thousand and No/100 Dollars ($165,000.00) had been paid.

All rights of Roy B. Kelly in and under said agreements have been transferred and conveyed to Panama and Venezuela Finance Company which in turn has assigned, sold, and delivered its entire interest and rights in said agreement to Clayton S. Kramer, the Plaintiff herein, who is the legal owner and holder of such agreement. Acting by and under the authority of the agreements above described, Panama and Venezuela Finance Company, Roy B. Kelly, and Clayton S. Kramer have designated a place of payment of such obligations to be at the office of Clayton S. Kramer in the First-Wichita National Bank Building in the City of Wichita Falls, Wichita County, Texas.

Although Panama and Venezuela Finance Company and Roy B. Kelly fully executed and complied with their portion of the above described agreement, the Defendant has failed and refused to pay any of the remaining installments, totaling One Hundred Sixty-Five Thousand and No/100 Dollars ($165,000.00) and have denied all liability therefor, thus constituting and making complete breach of said agreement and causing all of the obligations thereunder to become immediately due and payable.

III.

Plaintiff would further show unto the Court that the Defendant was and/or is doing business in the State of Texas at the time this cause of action arose, in the

interim period, and at the present time; that its principal officers reside in the State of Texas; that its business is carried on and supervised in the State of Texas; and that therefore this Court has jurisdiction over this foreign Defendant.

Wherefore, Premises Considered, Plaintiff prays that Defendant be cited and answer herein as required by law and that upon final hearing hereof Plaintiff do have and recover judgment against said Defendant in the sum of One Hundred Sixty-Five Thousand and No/100 Dollars ($165,000.00), together with interest thereon at the rate of Ten Per Cent (10%) from and after June 1, 1962; for costs of Court; and for such other and further relief, in law or in equity, to which they may show themselves justly entitled.

MOCK, BANNER &
McINTOSH,
By C. COIT MOCK,
(C. Coit Mock),
Attorneys for the Plaintiff.

1310 Ninth Street,
Wichita Falls, Texas.

DEFENDANT'S FIRST AMENDED ANSWER

Filed May 3, 1966.

[Caption Omitted in Printing]

To the Honorable Judge of said Court:

Comes Now Caribbean Mills, Inc., Defendant in the above entitled and numbered cause, and with leave of the Court files its First Amended Answer and would respectfully show to the Court:

First Defense.

Plaintiff's First Amended Petition fails to state a claim against the Defendant upon which relief can be granted.

Second Defense.

This Court lacks jurisdiction over the person of the Defendant.

Third Defense.

This Court lacks jurisdiction in the above entitled and numbered cause, in that Clayton S. Kramer is not the real party in interest, and by virtue of a purported assignment, Clayton S. Kramer has been improperly or collusively made Plaintiff in this cause to invoke the diversity jurisdiction of this Court, which would not otherwise be present.

Fourth Defense.

In the alternative, Defendant alleges that Plaintiff is precluded and incapacitated from maintaining the above entitled and numbered cause in that his purported assignor, Panama and Venezuela Finance Company has been transacting and doing business in the State of Texas and has not filed an instrument

with the Secretary of State of Texas designating an agent for service in the State of Texas, nor has Panama and Venezuela Finance Company obtained a certificate of authority to do business within the State of Texas.

Fifth Defense.

With respect to the allegations of the Amended Complaint called "Plaintiff's First Amended Petition," Defendant pleads as follows:

1. With respect to the allegations in Paragraph I, Defendant admits that Caribbean Mills, Inc., is a foreign corporation organized and existing under the laws of the country of Haiti, denies that it has a place of business in Dallas, Texas, and that it may be served with citation herein by serving its Vice President, Walter M. Spradley, at the office of Jenkens, Anson, Spradley & Gilchrist at 1201 Main Street, Dallas, Texas, and is without knowledge or information sufficient to form a belief as to the truth of all other allegations in said Paragraph and such allegations are therefore denied.

2. With respect to the allegations in Paragraph II, Defendant admits that on or about May 30, 1959, Caribbean Mills, Inc., executed a written agreement with Roy B. Kelly of Washington, D. C. and Panama-Venezuela Finance Company, a Panamanian corporation, but Defendant states that the allegations of said Paragraph II do not set forth the referred to agreement and Defendant denies all allegations in said Paragraph II which are inconsistent with the terms and provisions of said agreement or which purport to state less than all of the terms and provisions of said agreement; and, Defendant denies all other allegations contained in said Paragraph II.

3. Defendant denies the allegations of Paragraph III.

Sixth Defense.

Defendant has acquired all of Roy B. Kelly's right, title and interest in, to and under the May 30, 1959, Agreement, and the Defendant has acquired the right to all sums due and payable, or to become due and payable under said Agreement.

Seventh Defense.

Defendant has already fulfilled all of its obligations to Panama and Venezuela Finance Company and Roy B. Kelly under the May 30, 1959, Agreement, and has no obligation to make any further payments or payment to plaintiff, or any other party or parties under said Agreement.

Eighth Defense.

Plaintiff is now estopped from asserting any claim or right under the May 30, 1959 Agreement, in that prior to the time any installment payments were due under said Agreement Panama and Venezuela Finance Company, who had knowledge of the facts, represented to the Defendant, with the intention that said representations be acted upon, that Panama and Venezuela Finance Company had no further interest in or right to any further payments under the May 30, 1959, Agreement, and Defendant, who had no knowledge of the facts, or the means of obtaining knowledge, relied upon these false representations or concealment of material facts to its prejudice.

Ninth Defense.

In the alternative Defendant alleges that Panama and Venezuela Finance Company, who had knowledge

of its rights, voluntarily relinquished and waived any right which they might have had under the May 30, 1959 Agreement, by representing to the Defendant, who relied upon the representations that Panama and Venezuela Finance Company claimed no further interest in or right to any further payments under the said Agreement.

Wherefore, Premises Considered, Defendants prays that the relief prayed for by Plaintiff be denied, that the Plaintiff have and recover nothing of and from the Defendant, and that the Defendant go hence without day and with its costs.

RAIN, HARRELL & EMERY,
MORRIS HARRELL,
(Morris Harrell),
STAN McMURRY,
(Stan McMurry),
Attorneys for Defendant
Caribbean Mills, Inc.

4200 Republic National Bank Tower,
Dallas, Texas.

DEFENDANT'S MOTION TO DISMISS

Filed May 3, 1966.

[Caption Omitted in Printing]

To the Honorable Judge of said Court:

Now comes Caribbean Mills, Inc., Defendant in the above entitled and numbered cause, and moves the Court as follows:

1. To dismiss this action on the ground that this Court lacks jurisdiction over the person of the Defendant.

2. To dismiss this action or in lieu thereof to quash the return of service of summons herein on the grounds that his Defendant is a foreign corporation organized and existing under the laws of the country of Haiti and was not and is not subject to service of process in the Northern District of Texas and this Defendant has not been properly served with process herein.

3. To dismiss the action for lack of jurisdiction over the subject matter for the reason that by virtue of a purported assignment, Clayton S. Kramer was improperly and collusively made the Plaintiff in this suit for the purpose of invoking the diversity jurisdiction of this Court, which would not otherwise be present, in violation of Section 1359, Title 28, United States Code.

4. To dismiss the action for lack of jurisdiction over the subject matter for the reason that this action is being prosecuted in the name of Clayton S.

Kramer who is not the real party in interest, in violation of Rule 17(a) of the Federal Rules of Civil Procedure.

5. In the event that the Court should hold that this Court has jurisdiction over the subject matter and over the person of the Defendant and that the Defendant has been properly served, then Defendant moves to dismiss the action for the reason that, as shown by the attached certificate of the Secretary of State of Texas, Plaintiff is precluded and incapacitated from maintaining the above entitled and numbered cause in that his purported assignor, Panama and Venezuela Finance Company has been transacting and doing business in the State of Texas and has not filed an instrument with the Secretary of State of Texas designating an agent for service in the State of Texas, nor has Panama and Venezuela Finance Company obtained a certificate of Authority to do business within the State of Texas.

Defendant prays that this motion be sustained and that the action be dismissed.

RAIN, HARRELL & EMERY,
MORRIS HARRELL,
(Morris Harrell),
STAN McMURRY,
(Stan McMurry),
Attorneys for Defendant
Caribbean Mills, Inc.
4200 Republic National Bank Tower,
Dallas, Texas.

ORDER

Filed Jul. 6, 1966.

[Caption Omitted in Printing]

On the 20th day of May, 1966, came on for hearing in the above entitled and numbered cause, Defendant's Motion to Dismiss, and the Court having considered said Motion and the arguments of counsel and the depositions of the Plaintiff, and being of the opinion that the Defendant's Motion to Dismiss the Action for the reason that Clayton S. Kramer was improperly and collusively made the Plaintiff in this suit for the purpose of invoking the diversity jurisdiction of this Court, should be overruled, in that the assignment from Panama and Venezuela Finance Company to Clayton S. Kramer was good on its face, and being further of the op nion that the other grounds set forth in said Motion to Dismiss should be overruled.

It is therefore Ordered, Adjudged, And Decreed that the Defendant's Motion to Dismsis be, and the same is hereby overruled, to which action of the Court Defendant excepts.

Entered this 20 day of May, 1966.

SARAH T. HUGHES,
United States District Judge.

PLAINTIFF'S EXHIBIT NO. 4

Assignment of Sept. 21, 1964

Know All Men By These Presents:

That we, the undersigned Panama and Venezuela Finance Company, a Panamanian Corporation, for and in consideration of One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, does hereby assign, sell and convey to Clayton S. Kramer of Wichita Falls, Wichita County, Texas, all of our right, title and interest, including all actions, causes of actions, claims, right to make demands, right to designate place of performance and payment, monies due and/or to become due, arising from or out of a certain agreement and contract in writing, dated June 4, 1959, between Caribbean Mills, Inc., a Haitian Corporation, Roy B. Kelly of Washington, D.C. and Panama and Venezuela Finance Company, under which contract or agreement Caribbean Mills agreed to pay to Panama and Venezuela Finance Company and/or Roy B. Kelly the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) on such terms and at such times as were more fully set out in said instrument, a copy of which is attached hereto as Exhibit A, and fully incorporated herein by reference. This assignment specifically includes another certain agreement, made in connection with the original agreement heretofore described, such other agreement being a collateral agreement and contract of Murchison Brothers and others, dated on or about June 4, 1959, a copy of such agreement is also attached hereto as Exhibit B, and fully incorporated herein by reference.

Panama and Venezuela Finance Company warrants to Assignee herein that it is the owner of and entitled to all benefits arising by virtue of the agreements and/or contracts herein assigned and has the right to make this assignment of the same.

It is agreed that this assignment to the said Clayton S. Kramer is made under the laws of the State of Texas, and in the event that there is any question of validity of such assignment, it shall be construed and governed by the laws of the State of Texas, and the powers, duties and benefits flowing hereunder to the said Clayton S. Kramer shall be controlled by the laws of the State of Texas.

That I, the undersigned officer of Panama and Venezuela Finance Company am specifically authorized and empowered to make such assignments to Clayton S. Kramer and such contract for Panama and Venezuela Finance Company herein.

Made and executed on this the 21st day of Sept., A.D. 1964.

PANAMA AND VENEZUELA
FINANCE COMPANY,
By E. ALFARO.

DEFENDANT'S EXHIBIT NO. 1

Agreement of Sept. 21, 1964

STATE OF TEXAS
COUNTY OF WICHITA:

KNOW ALL MEN BY THESE PRESENTS: That we, Panama and Venezuela Finance Company, a Panamanian corporation, and Clayton S. Kramer, do hereby agree and contract as follows:

WHEREAS, previously the Panama and Venezuela Finance Company, for valuable consideration, by instrument in writing, irrevocably assigned, sold and conveyed to Clayton S. Kramer all of its right, title and interest under and arising out of a certain contract or agreement closed June 4, 1959, between Panama and Venezuela Finance Company, Caribbean Mills, Inc., and Roy B. Kelly, together with an assignment of a connected agreement dated on or about June 4, 1959, from Murchison Brothers and others; and,

WHEREAS, the said Clayton S. Kramer is now the sole owner of any action of causes of action derivative therefrom, with the independent right of management, control and prosecution thereof, and does hereby indemnify and hold harmless the Panama and Venezuela Finance Company from any cost or expense that has or may arise out of the prosecution of any demand or suit on said contracts; and,

WHEREAS, the said Clayton S. Kramer agreed to make demand on said contracts and collect or prosecute to final Judgment all claims thereon; it is hereby collaterally Agreed, that in the event of payment to or recovery on said contracts by Clayton S. Kramer, he will pay solely as a Bonus to Panama and Venezuela Finance Company, or anyone properly designated by it in writing, a sum equal to 95 per cent of the net proceeds or monies obtained from Caribbean Mills, Inc., or others, under or by virtue of the

contracts heretofore assigned to the said Clayton S. Kramer, it being understood by the parties hereto, that the said Clayton S. Kramer shall have the right to employ attorneys on a contingent fee basis, paying to such attorneys an amount not to exceed thirty-three and one-third per cent (33 1/3%) of the gross recovery obtained from Caribbean Mills or others, and to pay expenses of litigation not to exceed one-half (1/2) the total of such expenses. In other words, after the payment of attorney fees and expenses, Clayton S. Kramer is to pay to Panama and Venezuela Finance Company or its order, ninety-five (95) per cent of the remainder of the net recovery, if any, and retain five (5) per cent for his own use and benefit.

This contract and agreement by and between the parties hereto is made and is to be performed in the State of Texas; that the same was drawn by the parties with reference to the laws of the State of Texas, and it is hereby specifically contracted and agreed that in the event of any controversy, dispute or litigation relating to or arising out of this instrument, the laws of the State of Texas specifically control. In consideration of our mutual promise and consideration with which this instrument passes, we set our hands hereunto on this the 21st day of Sept. A.D. 1964.

/s/ Clayton S. Kramer
Clayton S. Kramer

PANAMA & VENEZUELA
FINANCE COMPANY

DEFENDANT'S EXHIBIT NO. 2

EDUARDO ALFARO
ABOGADO P.O. Box 951
PANAMA, R. DE P.

AVE. CUBA Y CALLE 33
EDIFICIO PONCE - OFICINA 12
APARTADO 951
TELEFONOS: 5-1213 - 5-1214

DIRECCION CABLEGRAFICA
ORAFLA – PANAMA

REGISTERED

September 23, 1964

C. Coit Mock, Esq.
Mock, Banner & McIntosh
1310 Ninth Street
Wichita Falls, Texas, U.S.A.

Dear Mr. Mock:

Enclosed herewith one copy of the Agreement and one copy of the Assignment, both in reference to the rights of Panama and Venezuela Finance Company, in the matter of Caribbean Mills, Inc.

Please acknowledge receipt.

Yours truly,

/s/ Eduardo Alfaro

EA:emd.

Encl. (Dictated but not read)

DEFENDANT'S EXHIBIT NO. 3

STATE OF TEXAS

COUNTY OF WICHITA:

KNOW ALL MEN BY THESE PRESENTS:

That I, Clayton S. Kramer, of Wichita Falls, Texas, hereinafter called Client, and MOCK, BANNER & McINTOSH, a partnership composed of C. Coit Mock, Jack G. Banner, and Ed McIntosh, hereinafter called Attorney, duly licensed and practicing attorneys of Wichita Falls, Texas, do hereby make the following contract and agreement:

WHEREAS, Client is the owner and holder, as assignee from Panama and Venezuela Finance Company, of all of the rights and interests arising out of a certain agreement and contract in writing, dated June 4, 1959, between Caribbean Mills, Inc., a Haitian corporation, Roy B. Kelley of Washington, D.C., and Panama and Venezuela Finance Company, under which contract or agreement Caribbean Mills agreed to pay to Panama and Venezuela Finance Company and/or Roy B. Kelley the sum of Two Hundred Fifty Thousand Dollars ($250,000), on such terms and at such times as were more fully set out in said instrument; and WHEREAS Panama and Venezuela Finance Company was the sole owner of the rights arising under said contract; and WHEREAS Panama and Venezuela Finance Company has assigned its entire cause of action to Client herein; and WHEREAS Caribbean Mills, Inc. and/or their successors have defaulted and/or refused to comply with the terms of said agreement; and WHEREAS it is the desire of the Client herein to obtain the services of said attorneys to represent him in the collection of any and all claims accruing under said contract, against each and every person responsible therefor, Client hereby employs and confirms the previous employment of said attorneys to prosecute said claim. This contract is on the following terms and conditions:

1. Client agrees to pay said attorneys One-Third (1/3) of the total recovery to him, as compensation for their services

in connection therewith, and hereby assigns and conveys to said attorneys One-Third (1/3) of any and all recovery obtained in his behalf whether by judgment, settlement or otherwise.

2. Client hereby agrees to reimburse said attorneys for any and all actual expenses other than ordinary office expenses and agree that said expenses may be deducted from the recovery in the said premises.

3. It shall be the exclusive privilege of the attorneys herein named to determine whether or not an appeal shall be made from any judgment, favorable or unfavorable, which shall arise from the trial of a lawsuit in connection with, the above claim.

4. We, and each of us, agree that no compromise, settlement, or proposal of compromise or settlement, on the above claims, shall be made without the consent of the others.

WITNESS our hands at Wichita Falls, Texas, on this 10th day of October, A.D. 1964.

/s/ Clayton S. Kramer
CLIENT

/s/ Jack Banner
FOR MOCK, BANNER & McINTOSH
ATTORNEYS

DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO ANSWER QUESTIONS PROPOUNDED TO HIM DURING DEPOSITION

Filed Feb. 7, 1966.

[Caption Omitted in Printing]

Comes Now, the Defendant, Caribbean Mills, Inc., and pursuant to Rule 37a of the Federal Rules of Civil procedure moves the Court for an Order Compelling the Plaintiff, Clayton S. Kramer, to answer certain questions propounded to him during the course of his examination by deposition, on the following grounds:

I.

The deposition of the Plaintiff, Clayton S. Kramer, a copy of which is attached hereto and made a part hereof as "Exhibit A" was taken at Dallas, Texas, by the Defendant, Caribbean Mills, Inc., on October 15, 1965, before Odell Oliver, a Notary Public in and for Dallas County, Texas.

II.

This deposition was taken pursuant to and in compliance with the agreement of the parties as set forth on Page 2 of said deposition.

III.

That during the course of this examination by deposition, Plaintiff, Clayton S. Kramer, upon the advice of his counsel, refused to answer the following questions:

(a) "Q. (By Mr. Harrell) What was your arrangement or agreement for the acquisition of this claim?" (Deposition, Page 27, Lines 16-17.)

(b) "Q. What did you pay for it?" (Deposition, Page 29, Line 10.) [The claim against Caribbean Mills, Inc.]

(c) "Q. What financial arrangments did you make for obtaining this assignment from Panama and Venezuela Finance Company?" (Deposition, Page 29, Lines 17, 18 and 19.)

(d) "Q. (By Mr. Harrell) Did you make any cash payment Mr. Kramer, in connection with the assignment to you?" (Deposition, Page 29, Line 25, Page 30, Lines 1 and 2.)

(e) "Q. (By Mr. Harrell) Mr. Kramer, did you take a promissory note to Panama and Venezuela Finance Company for the acquisition of this claim? (Deposition Page 32, Lines 17, 18 and 19.)

(f) "Q. (By Mr. Harrell) Mr. Kramer, did you borrow any money in connection with obtaining this claim by assignment?" (Deposition Page 33, Lines 6, 7 and 8.)

(g) "Q. (By Mr. Harrell) Mr. Kramer, if you borrowed any money for the purpose of acquiring this assignment, is there any party other than yourself liable on the debt?" (Deposition, Page 33, Lines 15, 16, 17 and 18.)

(h) "Q. The assignment marked Kramer Deposition Exhibit No. 1, recites a consideration of one dollar and other good and valuable consideration, what is the other good and valuable consideration referred to in this assignment, Mr. Kramer?" (Depo-

sition, Page 36, Lines, 5, 6, 7, 8 and 9.)

(i) "Q. Without inquiring as to the nature of it do I understand then that you have had other business arrangements with Panama and Venezuela Finance Company?

"A. Yes.

"Q. I'm going to ask you what they were?"

(j) "Q. Mr. Kramer, did you have any conversations with respect to the consideration for the assignment of this claim which you assert?" (Deposition Page 52, Lines 11, 12 and 13.)

(k) "Q. Do the other agreements that you have with Panama and Venezuela Finance Company have to do with payment for this assignment of the claim which you have acquired? (Deposition, Page 55, Lines 2, 3, 4, and 5.)

IV.

That the above questions inquire into matters that are not privileged and which are relevant to the subject matter involved in the pending matter.

Wherefore, Defendant, Caribbean Mills, Inc. prays that this Court order the Plaintiff, Clayton S. Kramer, to answer the aforementioned questions and questions which are related thereto, and for such other and further relief as the Court may deem just.

RAIN, HARRELL & EMERY,
MORRIS HARRELL,
(Morris Harrell),
Attorneys for Defendant,
Carribbean Mills, Inc.

42 Floor Republic Bank Tower,
Dallas, Texas.

TESTIMONY OF CLAYTON S. KRAMER

Filed Sep. 22, 1966.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

Clayton S. Kramer,
vs. CA No. 3-1168.
Caribbean Mills, Inc.

Be It Remembered that on the 25th day of May 1966 before the Honorable Sarah T. Hughes, United States District Judge, and a Jury, at Dallas, Texas, the following proceedings were had in the above styled and numbered cause:

Appearances:

Mock, Banner & McIntosh, Wichita Falls, Texas, By: Mr. Jack Banner, For the Plaintiff.

Rain, Harrell and Emery, Dallas, Texas, By: Mr. Morris Harrell, Mr. Stan McMurry, For the Defendant.

[3]

Dallas, Texas
May 25, 1966
Wednesday, 2:00 p.m.

Proceedings.

[57]

* * *

CLAYTON S. KRAMER, having been called as a witness on behalf of the Plaintiff,, being first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. Banner:

Q. State your name, please.

A. Clayton Kramer.

Q. And where do you live, please?
A. In Wichita Falls, Texas.
Q. And what is your occupation or profession?
A. I am an attorney.

The Court:
A little louder, Mr. Kramer, if you will, please.

The Witness Kramer:
All right, ma'am.

(By Mr. Banner):
Q. How long have you been licensed to practice law?
A. Since 1954.
Q. Are you duly licensed by the State of Texas and is your license to practice law properly on file [58] with the Supreme Court of the State of Texas?
A. Yes, it is.
Q. Mr. Kramer, I will ask you to state whether or not you acquired a certain assignment which has heretofore been marked Plaintiff's Exhibit 4, from the Panama and Venezuela Finance Company?
A. Yes.
Q. And is this the same instrument or the same assignment that was physically delivered to you?
A. Yes, it is.
Q. I will ask you to tell the Court and Jury whether or not you accepted such assignment from the Panama-Venezuela Finance Company?
A. Yes, I certainly did.
Q. I will ask you to tell the Ladies and Gentlemen of this Jury whether or not consideration was paid for such assignment?

Mr. Harrell:

We object to that question, Your Honor, as calling for a conclusion of this witness. He can state what he paid for it if he wishes.

The Court:

The instrument, I think, speaks for itself.

Mr. Banner:

Very well, Your Honor.

The Court:

I will sustain the objection.

[59] (By Mr. Banner):

Q. I ask you to look at the assignment and the contract marked or the agreement marked Exhibit A, attached to the back thereof—are you familiar with that agreement?

A. Yes, I am.

Q. Who is that agreement between?

A. The agreement is between Panama and Venezuela Finance Company, Roy B. Kelly and Caribbean Mills, Incorporated.

Q. Mr. Kramer, would you look at that for a few moments there and tell the Ladies and Gentlemen of this Jury whether or not the agreement attached to the assignment which you received is the same agreement or a copy of the same agreement that has been previously marked as Plaintiff's Exhibit 1?

Mr. Harrell:

Your Honor, the instrument speaks for itself and both have been marked.

The Court:

I sustain the objection.

(By Mr. Banner):

Q. Following the receipt of the assignment, I will ask you to state whether or not you made demand of the Caribbean Mills, Inc., of payment of the annual installment in the sum of $13,750, totalling $165,000 as provided for in the agreement marked Exhibit A?

A. I did not.

[60] Mr. Harrell:

We object to that question. It contains an interpretation of counsel as to what it provided.

The Court:

I sustain the objection.

(By Mr. Banner):

Q. Mr. Kramer, did you ever make any demand of Caribbean Mills on the contract marked Plaintiff's Exhibit 1?

A. Yes.

Q. Was any payment ever made to you by Caribbean Mills following such demand?

A. No—following that demand no payment was ever made to me by Caribbean Mills.

Q. I'll ask you to state whether or not following such demand anything of value was received by you on the contract marked Plaintiff's Exhibit 1?

A. No—following this demand through my attorneys nothing of any value was received.

The Court:

Will you talk a little louder?

The Witness Kramer:

Following this demand through my attorneys nothing of value was ever received on this contract.

(By Mr. Banner):

Q. Are you the same Clayton S. Kramer who has brought this present action against Caribbean Mills, Inc.?

A. Yes, I am.

[61] Q. I'll ask you to state whether or not you authorized the filing of such suit?

A. Yes, I did.

Q. I'll ask you to state whether or not the subject matter of such suit is the payment of $165,000 called for in the contract marked Plaintiff's Exhibit 1?

Mr. Harrell:

We object to that question—the subject matter of the suit is a matter of record here.

The Court:

I sustain the objection.

Mr. Banner:

Very well, Your Honor.

(By Mr. Banner):

Q. Mr. Kramer, I show you an instrument filed of record the 9th day of February, '65, styled Clayton S. Kramer versus Caribbean Mills, Incorporated, entitled "The Plaintiff First Amended Petition" and ask

you to look at that and state whether or not that sets forth your cause of action herein.

Mr. Harrell:

We object to that, Your Honor, it calls for a conclusion of the witness.

The Court:

I sustain the objection.

Mr. Banner:

Very well, Your Honor, we will offer as the best evidence the Plaintiff's First Amended Petition herein.

Mr. Harrell:

We object to that, Your Honor, [62] it is a part of the Court record.

The Court:

I sustain the objection.

Mr. Banner:

Note our exception.

(By Mr. Banner):

Q. Following the filing of this suit, Mr. Kramer, have you received any annual installment payments as called for in the contract marked Plaintiff's Exhibit 1?

A. No, sir.

Mr. Harrell:

We object to that also as an interpretation by the Plaintiff's counsel.

The Court:

I sustain the objection.

(By Mr. Banner):

Q. I'll ask you to state whether or not following the filing of this suit you have received anything of value on the agreement in question, or from Carribean Mills—period?

A. No.

Q. I'll ask you to state whether or not you have entered into any written contract or agreement with Caribbean Mills after the filing of this suit?

A. No.

Q. I'll ask you to state whether or not you have executed any release or waiver of claim that you might possess against Caribbean Mills, Inc., since the filing of this suit?

Mr. Harrell:

Your Honor, I believe that is [63] immaterial and irrelevant.

The Court:

I'll overrule the objection.

A. No, I have not,—no.

(By Mr. Banner):

Q. I'll ask you to state whether or not you have entered into any contract or agreement whatsoever waiving or abrogating any payment to you by Caribbean Mills, Inc.?

A. No, sir.

Mr. Banner:

Pass the witness.

CROSS EXAMINATION

By Mr. Harrell:

Q. Mr. Kramer, you are an attorney in the City of Wichita Falls, Texas?

A. Yes.

Q. Is your principal business the practice of law?

A. Yes.

Q. I'll ask you, Mr. Kramer, how you acquired the assignment which has been marked here, I believe, as Plaintiff's Exhibit No. 1—how did you physically acquire it?

A. I physically acquired it attached to Exhibit B of Plaintiff's Exhibit 4.

Q. You acquired then a copy?

A. Yes—I acquired a copy at that time—the [64] original or this duplicate original about the same time. As to how I acquired them—I acquired them from Mr. Banner.

Q. Were these assignments—was this assignment accompanied by any letter or communication?

A. Yes—Plaintiff's Exhibit 4—when it was received at my attorney's office was accompanied by a letter of transmittal.

Q. Was that letter then transmitted on to you?

A. A copy of it was.

Mr. Harrell:

Your Honor, may I approach the bench with Mr. Banner?

The Court:

Yes.

(At this time there was a conference at the Bench with between Counsel Harrell and Counsel Banner and the Court off the record and out of the hearing of the Jury and the Court reporter.)

(By Mr. Harrell):

Q. This letter which transmitted this assignment then was received by Mr. Banner, a copy, of which was furnished to you, Mr. Kramer, is that correct?

A. It was furnished me by Mr. Banner. I believe the letter was addressed to his partner, Mr. Mock.

Q. I understood you to say, Mr. Kramer, you were familiar with this agreement which has been marked here [65] as Plaintiff's Exhibit 1, and I am talking about the agreement of May 30, 1959—was that your testimony, sir?

A. I was familiar with the terms of this agreement. Whether I had actually laid eyes on this original or duplicate original—I don't know.

Q. Were you a party to this agreement, Mr. Kramer?

A. The May 30, 1959?

Q. Yes.

A. No. sir—of course not—no.

Q. Have you ever represented the Panama and Venezuela Finance Company as an attorney?

A. No, sir.

Q. Have you represented any of the other original parties to this agreement, marked Plaintiff's Exhibit 1?

A. No, sir.

Q. When did you first learn of this agreement marked Plaintiff's Exhibit 1, Mr. Kramer?

A. I cannot tell you exactly when I learned of the agreement. I can tell you when I learned of the contents—the terms—the substance of the agreement—that was in the summer of 1964—the early summer.

Q. The agreement of course being dated May 29 or [66] May 30th of 1959, is that correct?

A. Yes.

Q. I understood you to say in answer to a question that was asked by Mr. Banner that you made demand on the agreement—how did you do that, Mr. Kramer?

A. I authorized Mr. Banner to make demand, formal demand on this agreement.

Q. And whatever demand was made, was one made by Mr. Banner after—at your direction?

A. That's correct.

Q. But not by you, is that correct?

A. That's right.

Mr. Harrell:

Your Honor please, I want to ask this witness some further questions at this time, if I may, pertaining to this total transaction?

The Court:

Do you have any questions other than that to ask this witness?

Mr. Harrell:

I believe no further questions with respect to his direct examination.

The Court:

I'm going to excuse the Jury and ask you to come back at 9:00 o'clock in the morning, because these other matters are to be taken up outside the presence of the Jury, so you may be excused at this time.

[67] (At this time the Jury left the Courtroom—4:04 p.m., and the proceedings continued as follows):

Mr. Harrell:

If Your Honor please, the Court has indicated that there would be no summation to the Jury of any issue with respect to the Defendant's defense that Mr. Kramer was made the Plaintiff in this suit collusively and improperly to invoke the Court's jurisdiction or to what the Defendant believes to be the obligation and burden of the Plaintiff to prove that such is not the case, and we therefore would like to further interrogate Mr. Kramer out of the presence of the Jury in accordance with Her Honor's ruling on this matter.

The Court:

You may do so.

Mr. Harrell:

I am saying to Your Honor, that we request that each of the questions that I will ask and the answers given be submitted to the Jury and that the questioning take place in the presence of the Jury and preserving that point, if we may, Your Honor.

The Court:

You may and you may proceed.

(By Mr. Harrell):

Q. Mr. Kramer, prior to your first learning of this contract which has been marked [68] Plaintiff's Exhibit 1, had you had any conversations with any representative of Panama-Venezuela Finance Company?

A. No.

Q. Had you had any conversation with Mr. Roy Cohn or anyone with the law firm in New York City that he is connected with?

A. No, sir.

Q. Then is it your testimony that the first time that you heard of this contract was from Mr. Banner?

A. That's correct.

Q. Now, state the circumstances of your being advised of the existence of this contract.

A. As well as I can recall it was in the early part of the summer of 1964, and I was talking to Mr. Banner, as we frequently did and still do, and he brought the subject up. Now, he didn't bring up the subject of this specific contract, he brought up the subject of the claim and the fact that there might be a claim that could be acquired.

Q. Did he tell you that he was doing some briefing in connection with the claim?

A. I think—in connection with the claim—no, sir. I don't believe he did.

Q. Did he tell you he was doing some briefing in [69] connection with this contract?

A. I could see he was doing some briefing.

Q. Did he tell you that, Mr. Kramer?

A. No—not that I recall.

Q. How did vou know that he was then doing some briefing?

A. Well, I do it myself and I know what it looks like.

Q. Were you in Mr. Banner's office then?

A. Yes, I'm sure I was then.

Q. At a time when he was engaged in briefing some point in connection with this contract marked Plaintiff's Exhibit 1?

A. I don't know whether it was in connection with it or not.

Q. Did he tell you that Mr. Cohn had asked him to do some briefing in connection with this matter?

A. No, sir, he did not.

Q. Did you later find out that that was the case?

A. No, sir.

Q. Did he tell you subsequently that he was briefing a legal point in connection with this matter at the request of Mr. Roy Cohn?

A. No, sir.

[70] Q. Or of the law firm that Mr. Cohn is connected with?

A. No, sir.

Q. Did he tell you that it might be possible for someone to acquire this claim and make some money on it?

A. Yes, sir.

Q. And did you say that you were interested in acquiring it for that purpose?

A. I certainly did.

Q. What did he tell you, that is, Mr. Banner?

A. Well, all our conversations didn't occur—just one conversation and then bang—we went into things and conversations occurred over a period of several months.

Q. All right, will you tell me what Mr. Banner said on the first conversation he had with you in connection with this matter?

A. I couldn't tell you what he said on the first conversation, Mr. Harrell, I couldn't.

Q. But he did tell you he was briefing a legal point involving a cause of action for a claim on which if prosecuted or enforced might result in profit for anybody that prosecuted it, isn't that right?

A. That may be right. I am not saying that it [71] isn't. He told me that he was briefing—at that time on this point—I'm not sure what he was doing. He told me he was doing some briefing, and as I recall he mentioned at some time or other that he was doing some briefing.

Q. Did you later learn that this claim Mr. Banner was talking about was a claim under this contract between Panama-Venezuela Finance Company, Roy Kelly, and Caribbean Mills, Inc.?

A. I think that's right.

Q. Did you learn that from Mr. Banner?

A. Pardon me—I'm not sure I understood your question just before this one?

Q. I say—did you learn that the claim that Mr. Banner was speaking to you about was a claim that was predicated upon this contract which has been marked Plaintiff's Exhibit 1?

A. Yes—yes.

Q. Did Mr. Banner tell you that?

A. Yes.

Q. Did you tell him that you were interested in acquiring the claim?

A. Yes, sir.

Q. Did you know whether or not that had been—there had been any payments made on the contract with [72] respect to the $165,000 at the time that you acquired the claim?

A. At the time I acquired the claim, to the best of my knowledge, I knew that no payments had been made—it was at the time of the assignment.

Q. You knew that no payments had been made, is that correct?

A. I was satisfied that no payments had been made.

Q. And at the time that you talked with Mr. Banner about the claim, you knew that none of the installment payments of $165,000 total had been made, is that right?

A. That's correct, but on the first conversation, I'm not sure that I knew that. I doubt if I did on our first conversation. By the time I took the assignment on September 21, 1964—yes—I knew as much as I needed to know about the fact that those installments had not been paid.

Q. Mr. Kramer, did Mr. Banner tell you how he had knowledge of this contract?

A. No, sir, I don't believe he did.

Q. Did he tell you he had talked with Mr. Roy Cohn about this contract?

A. No, sir, I don't believe that he told me that.

[73] Q. And you didn't ask him how he knew of the existence of the contract?

A. No, sir.

Q. Did you tell Mr. Banner that you wanted to acquire the claim?

A. Yes—again, I first told him I was interested and would he look into it, and later I told him "Yes, I would like to acquire the claim."

Q. Do you know what Mr. Banner did in connection with your acquisition of the claim?

A. I know he carried out some investigation and some negotiation.

Q. Did he tell you who he talked to in connection with your possible acquisition of this claim?

A. I don't believe he did at that time.

Q. Did he at any time, Mr. Kramer, tell you who he had talked to in connection with your acquisition of the claim?

A. Mr. Harrell, I'm not sure he told me who he talked to in connection with my acquisition of the claim. I do know—I just don't know if he ever told me who he did talk to. It didn't matter to me who he talked to.

Q. I'm not asking you whether it mattered to you, I'm asking you if you know whether or not you know [74] who he did talk to?

A. I stand corrected—no, I don't know

Q. Did Mr. Banner ever tell you who he was talking to in connection with this claim or your acquisition of the claim?

A. In connection with my acquisition of the claim, I think he told me sooner or later that he had talked to Mr. Alfaro—now, I'm not sure of that.

Q. That Mr. Banner had talked with Mr. Alfaro?

A. I think so.

Q. Did he tell you he had talked with Mr. Cohn in connection with it?

A. No, sir, I don't recall his telling me that he did.

Q. Did he tell you he had talked with Mr. Roy Kelly in connection with your acquisition of it?

A. No, sir.

Q. Was a copy of this agreement, a copy of which is marked Plaintiff's Exhibit 1, shown to you at the time you first discussed this matter with Mr. Banner?

A. Not when I first discussed it with him—no, sir—not the first time.

Q. Was it shown to you at a time between your first conversation and the date of the assignment?

[75] A. I'm sure that it was—yes—I believe it was.

Q. Now, Mr. Kramer, at the time when you acquired an assignment of this contract which has been marked Plaintiff's Exhibit 1, you had in the back of your mind that suit would have to be instituted on the contract, didn't you?

A. No, I would say that as a remote possibility it was there.

Q. You knew demand had been made and that it had not been paid, did you not?

A. No, sir—no, sir. I knew that an inadequate demand had been made.

Q. Did it occur to you to ask Mr. Banner why this claim of a Panamanian Corporation should be offered to you in Wichita Falls, Texas?

A. I didn't need to—Mr. Banner had had a number of dealings and matters that he had handled just about in all parts of the world—from Algeria to Saudi Arabia and Central and South America and Canada, and—did it occur to me? It didn't seem unusual to me at all, Mr. Harrell.

Q. Mr. Banner wasn't handling any claim in connection with this claim at the time you talked to him, was he?

[76] A. No, sir, not that I know of.

Q. And yet you didn't ask Mr. Banner how it was that this claim involving a Panamanian corporation should be offered to a resident of Texas, is that correct?

A. Well, it wasn't being offered to a resident of Texas at that time. Mr. Banner wasn't offering me the claim.

Q. Well, you were offered the claim by Panama and Venezuela Finance Company, were you not?

A. In a manner of speaking it was offered to me. Eventually it was delivered to me—yes.

Q. Yes. And did I understand you to say that you accepted the assignment on Panama and Venezuela Finance Company?

A. Yes, sir, I accepted that assignment when it came back on September 23 or after September 23—mailed with that letter.

Q. Prior to your obtaining this assignment, Mr. Kramer, had you seen the files of Panama-Venezuela Finance Company in connection with this claim?

A. No, I didn't see their files.

Q. Have you ever seen their files?

A. It may be that I saw part of their files, but I wouldn't have the slightest idea whether it was [77] their file or not, but have I seen their complete file—no—of course not.

Q. And Panama and Venezuela Finance Company sent you nothing in the way of correspondence or documentation in connection with this assignment of the contract or your claim?

A. That's what I was attempting to explain to you on the last question. Yes—there was some correspondence and there were some other instruments which were sent to me—to Mr. Banner for me. If it would make this any more brief—excuse me.

Q. Have you seen any of the files of Mr. Kelly in connection with this assignment?

A. My answer would be the same. It may be that I have seen letters out of his file, copies of letters or some instruments that came from his files but I can't tell you whether I saw his files or not.

Mr. Harrell:

Your Honor, we are going to object to Mr. Banner shaking his head up and down and across on every question we ask.

The Court:

I haven't been looking at him, but if he has been signaling, I instruct him not to signal.

Mr. Banner:

I haven't been signaling, Your Honor, and I don't think there is any necessity [78] for Mr. Kramer to look at me. He is looking at Mr. Harrell and not me.

Mr. Harrell:

Well, then, in that case I suggest the shaking is unnecessary.

Mr. Banner:

Morris, it's in utter incredulity at your line of questioning.

Mr. Spradley:

But it is a fact.

(By Mr. Harrell):

Q. Mr. Kramer, following the receipt of the assignment—

Mr. Banner:

If it please the Court, I don't know what Mr. Spradley's position in this cause is, but I don't particularly appreciate his sidebar remarks and comments to me as I sit here.

The Court:

Well, I can't hear those either so I instruct Mr. Spradley not to talk to Mr. Banner.

Mr. Spradley:

I apologize, Your Honor.

Mr. Banner:

Thank you, Your Honor.

(By Mr. Harrell):

Q. At the time, Mr. Kramer, that you were discussing with Mr. Banner your acquisition of this contract or claim on the contract, was there any agreement made with Panama-Venezuela Finance Company other than the assignment?

A. There was a collateral agreement, the terms of which were discussed.

[79] Q. Were the terms of the collateral agreement, as you call it, discussed with anyone other than Mr. Banner by you?

A. No.

Q. Did Mr. Banner tell you that he had discussed the matter with someone?

A. He told me what Panama-Venezuela Finance Company was willing to do and I assumed therefore that he spoke with someone.

Q. What did he tell you that Panama-Venezuela Finance Company was willing to do?

A. That they were willing to assign me the claim.

Q. Well, were they willing to do anything else?

A. Yes—ultimately they were.

Q. And what was that?

A. They were ultimately willing to assign the claim to me with no strings attached.

(Instruments marked by the Reporter as Defendant's Exhibits Nos. 1 and 2, for identification.)

(By Mr. Harrell):

Q. Mr. Kramer, I hand you what has been marked as Defendant's Exhibit No. 2, and ask you if that is a copy of the letter which transmitted the assignment and agreement from Panama-Venezuela [80] Finance Company to your attorneys?

A. Yes—as far as I know it is.

Q. And is that a copy of the letter which was handed to you by your attorney, Mr. Banner?

A. Yes.

Q. Along with the statement that that was the letter that had been received along with the assignment and the agreement?

A. Yes—I suppose so.

Mr. Harrell:

Your Honor, we offer in evidence Defendant's Exhibit No. 2.

Mr. Banner:

No objection, Your Honor.

(By Mr. Harrell):

Q. Mr. Kramer, was there transmitted by the letter dated September 23, 1964, marked Defendant's Exhibit 2, an agreement which has been marked as Defendant's Exhibit 1?

A. Yes, sir.

Q. Was there also transmitted by this letter marked Defendant's Exhibit 2, an assignment which has been marked Plaintiff's Exhibit 4?

A. Yes—as far as I know, that is correct.

Q. At the time that you received these exhibits—this assignment, the instrument in—entitled "Agreement" and the letter, had you already executed both the assignment and the agreement?

[81] A. Yes.

Q. And had those documents been transmitted to Mr. Banner?

A. Yes, sir.

Q. Do you know whether or not the assignment marked Plaintiff's Exhibit 4, was ever signed by any representative of Panama-Venezuela Finance Company?

A. It was signed by Mr. Alfaro.

Q. Did you see him sign it?

A. No, sir.

Q. Do you know him?

A. No, sir.

Q. Have you ever seen him sign any instrument?

A. No, sir.

Q. Then you don't know whether he signed the assignment marked Plaintiff's Exhibit 4, or not, do you, Mr. Kramer?

A. Not from witnessing his signature on it—no, I don't.

Q. As a matter of fact, you have never even met Mr. Alfaro, is that correct?

A. That's correct.

Q. Or talked with him?

A. That's correct.

Q. Or communicated with him in any form?

[82] A. That's correct.

Q. And I will show you Defendant's Exhibit 1, and ask you if the original of that exhibit bears your signature?

A. Yes, it does.

Q. Was the assignment to you which is marked Plaintiff's Exhibit 4 and the agreement between you and Panama and Venezuela Finance Company marked Defendant's Exhibit 1—are they dated the same date?

A. Yes—that's correct.

Q. I'll ask you who you ever talked to about the percentage of the net proceeds or monies obtained from Caribbean Mills in connection with this agreement which has been marked Defendant's Exhibit 1?

A. I discussed it with Mr. Banner.

Q. When did you discuss that with Mr. Banner?

A. Well, it would be somewhere between our first conversation in the summer of '64, and September 1, of 1964, and this of course took place over the biggest part of that period of time.

Q. And this was at the same time you were also discussing the contract between Panama-Venezuela, Kelly, and Caribbean Mills, is that right?

A. Yes—roughly the same month.

Q. Who first mentioned the fact that you would [83] give to Panama-Venezuela Finance Company 95% of any net recovery in this lawsuit?

A. I'm not sure who—you know—who brought it up first.

Q. Did you bring it up first?

A. Well, indirectly—I did. I told Mr. Banner that I did not want to put up any cash to purchase the claim, that I did not—that I would prefer not to borrow a large sum of money for it. On the other hand, I wanted a claim that was clear with no strings attached, that I wouldn't have to answer to anyone else for, and I don't know who brought it up, but ultimately I told Mr. Banner, "I don't want the assignment messed up," but I would give him a bonus.

Q. To be signed contemporaneously with the assignment?

A. No, sir—not necessarily.

Q. That's the way it was done?

A. That's the way it was done, but I think that assignment might have been executed without the bonus agreement—the collateral agreement at all.

Q. That is your assumption and not based upon any conversation you ever had with Panama-Venezuela Finance Company, is it?

A. No—no, it is not based on any actual or [84] parent authority.

Q. How was this figure of 95% arrived at, Mr. Kramer?

A. I don't know exactly how that figure of 95% was arrived at. I think we had some discussion about 90%.

Q. Discussion with whom?

A. With Mr. Banner—I had some discussion with Mr. Banner about it.

Q. Who was he representing at that time?

A. He was representing me.

Q. And do I understand then that you and he thought that 95% was the percentage that should go into this agreement?

A. Ultimately—yes, and I thought that was fair.

Q. Now, Mr. Banner was representing you before you got the assignment from Panama-Venezuela Finance Company in connection with what?

A. He was representing me in the—first of all—I would say—I don't know if he was representing me technically in the investigation or not. In the negotiations later, I would say he was—at least as a friend—he was.

Q. In the negotiations with Panama-Venezuela [85] Finance Company?

A. Well, in negotiations with whoever—the way I did it was—I told him to find out what he could about it and I would be willing to do this.

Q. Mr. Kramer, you said you didn't want to put out any money in connection with this matter, is that correct?

A. Yes—not any great sum.

Q. How much money have you put out in connection with it?

A. So far—$1.00.

Q. And that is the recited consideration for the assignment marked Plaintiff's Exhibit 4?

A. Yes, sir.

Q. Have you put out any money as far as expenses of the litigation is concerned?

A. Yes, sir—some.

Q. What expenses have you paid?

A. The expenses that I have paid—so far as actually paid in cash—have been my own expenses in connection with this matter, particularly those of traveling down here last week and this week for trial.

Q. What is your arrangement, Mr. Kramer, with Panama-Venezuela Finance Company insofar as expenses are concerned?

[86] A. I believe the agreement is that I must indemnify, or I have agreed to indemnify and hold them harmless from any and all expenses and Court costs both past and future in connection with the handling and prosecution of this claim.

Q. This agreement here which has been marked Defendant's Exhibit 1, provides on the second page —"It being understood by the parties hereto that the said Clayton S. Kramer shall have the right to employ attorneys on a contingent fee basis, paying to such

attorneys an amount not to exceed 33 and one-third per cent of the gross recovery obtained from Caribbean Mills or others, and to pay expenses of litigation not to exceed one-half the total of such expenses." What does that mean?

A. My understanding of it is this—that from the total recovery there is to be deducted one-third as attorneys' fees. Then off of what is left, half of the expenses come off before the 95 and 5 are computed.

Q. So that one-half of the expenses would then be paid by Panama-Venezuela Finance Company, is that correct?

A. No, I wouldn't put it that way. What they are entitled to under their contract is reduced by [87] one-half of the expenses. They don't have to come up with any cash.

Q. Who is going to pay the other half, Mr. Kramer?

A. I am responsible for it.

Q. So that as far as the expenses are concerned, you are responsible for one-half of the expenses of the litigation?

A. No, sir, I think you are trying to twist my words.

Q. I'm not trying to twist your words, I'm trying to find out what the situation is.

A. I am responsible for all the expenses. If there is no recovery, I am responsible for it. If there is a recovery, then one-half of the expenses, they come out of my five per cent and the other half of the expenses come out of their 95% per cent, and of course a proportionate share of the attorneys' fees comes out of both percentages.

Q. So that in any event of recovery, one-half of the expenses of the litigation will come out of the 95% that

goes to Panama-Venezuela Finance Company, is that right?

Mr. Banner:

Your Honor, I object to all of this. The contract speaks for itself and that is [88] the best evidence.

The Court:

I sustain the objection. It does speak for itself and that is really not my interpretation of it.

Mr. Harrell:

Your Honor, may I without arguing with the Court call Your Honor's attention to the language of this agreement, which to me seems somewhat ambiguous, and that is the reason why I am interrogating him on it.

The Court:

All right, read it to me.

Mr. Harrell:

It says—"it being understood by the parties hereto, that the said Clayton S. Kramer shall have the right to employ attorneys on a contingent fee basis, paying to such attorneys an amount not to exceed 33-1/3% of the gross recovery obtained from Caribbean Mills or others, and to pay expenses of litigation not to exceed one-half the total of such expenses. In other words, after the payment of attorney fees and expenses, Clayton S. Kramer is to pay to Panama and Venezuela Finance Company or its order, 95 per cent of the remainder of the net recovery, if any, and retain 5 per cent for his own use and benefit."

Mr. Banner:

If it please the Court, I think [89] that whole paragraph has to be read from the first, where it is stated that the net shall be determined by this particular formula.

Mr. Harrell:

Really what I am trying to find out is whether, or not any of the expenses are chargeable against the 95 per cent that will go to Panama-Venezuela Finance Company in the event of recovery.

The Court:

Well, let him answer the question as to what his understanding is. I think the contract does speak for itself, but he may testify as to his understanding.

Mr. Banner:

Note our exception.

The Witness Kramer:

Well, I may have misstated my understanding of the agreement a moment ago. From the gross recovery is deducted attorneys' fees. From that figure is then deducted expenses, and then from the balance we compute the 95 per cent and the 5 per cent.

(By Mr. Harrell):

Q. Mr. Kramer, did anyone ever tell you that the 95 per cent of the net proceeds or monies to go to Panama-Venezuela Finance Company in the event of recovery was an acceptable percentage to them?

A. That it was an acceptable percentage to them?

[90] Q. Yes.

A. Yes.—Mr. Banner told me that it was, and obviously Mr. Alfaro expressed their satisfaction with it.

Q. Did Mr. Banner tell you he had talked with anybody about the 95 per cent?

A. No, he didn't say he had talked to anybody but he said "It is agreeable with them".

Q. Did he tell you how he knew it was agreeable, if in fact it was?

A. No, sir.

Q. Did he tell you he had talked to Mr. Alfaro about that?

A. No, sir—he didn't.

Q. Would your testimony that it was all right with Mr. Alfaro be a presumption on your part?

A. Yes—it would be because at the same time I told Mr. Banner that this was all that I would do.

Q. Mr. Kramer, what have you done in connection with the prosecution of your claim? Do you understand that question, sir?

A. Yes, I understand it. After I accepted the claim I subsequently retained Mr. Banner's firm to represent me on a written contract, and then I authorized them to make formal demand on the claim—demand for [91] payment of the $165,000.

Q. Have you done anything else?

A. Well, I most certainly have. After—much to my shock—the demand was completely rejected, subsequent to that I authorized them to proceed with filing suit.

Q. You instructed your attorneys to file suit, have you done anything in connection with the direction of the handling of the suit?

A. Yes.

Q. What?

A. I have talked to them at different times ever since the suit was filed.

Q. That is to your attorneys?

A. Yes, they have told me what they intended to do, what they have done, what hearings were to be held, and what had been held. I have inquired what they were doing and why, and I most wholeheartedly approved of what they have done.

Q. Did you take an active part in the case as an attorney, Mr. Kramer?

A. No, sir, I didn't. Had I done that, I would have had the 33-1/3% and Mr. Banner would have had the 5%.

Q. Now, may I inquire Mr. Kramer, as to why [92] you did not prosecute this case yourself?

A. I think it is ridiculous for a lawyer to represent himself in litigation, or for that matter in quite a few other proceedings.

(Instrument marked by the reporter as Defendant's Exhibit No. 3, for identification.)

(By Mr. Harrell):

Q. Mr. Kramer, I hand you what has been marked as Defendant's Exhibit 3, and ask you if that is a photo copy of a contract you entered into with the law firm of Mock, Banner & McIntosh?

A. Yes, sir, it is.

Q. Under date of October 10, 1964?

A. Yes, sir.

Mr. Harrell:

We offer in evidence Defendant's Exhibit 3, Your Honor.

Mr. Banner:
No objection.

(By Mr. Harrell):
Q. Your testimony is that you signed this agreement between you and the Panama-Venezuela Finance Company marked Defendant's Exhibit 1, prior to your receipt from Panama-Venezuela Finance Company of the executed assignment to you, is that correct?
A. Yes.
Q. And the agreement which you signed made reference to the employment of attorneys and to the [93] sharing of any net recovery, is that correct?

Mr. Banner:
Your Honor, the instrument speaks for itself. We have gone over this four or five times.

The Court:
I sustain the objection.

(By Mr. Harrell):
Q. I will ask you, Mr. Kramer, if it is not a fact that in the taking of your deposition in this case on October 15, 1965, if I did not ask you the following questions to which you gave the following answers.

Mr. Banner:
What page, please, Morris?

Mr. Harrell:
Page 26.

"Question: At the time you acquired this claim by assignment, did you contemplate the institution of a

legal procedure—legal proceedings for the purpose of enforcing collection?

"Answer: No, I can't honestly say that I did.

"Question: You did not consider the necessity or advisability of instituting suit on the claim?

"Answer: It was in the back of my mind—yes."

You were asked those questions and those were your answers, are they not, Mr. Kramer?

[94] A. Yes, sir—those along with some other.

Q. And I further asked you, "And you knew as I understand it that demand had been made?

"Answer: I knew that some demand had been made. I don't think it was a formal demand.

"Question: Well, you knew that the installments had not been paid?

"Answer: That's right."

I asked you those questions to which you gave those answers?

A. To the best of my memory—you are reading it and it speaks for itself.

Q. Mr. Kramer, I understood you to say a few minutes ago in response to an earlier question that the agreement between you and Panama and Venezuela Finance Company was collateral to the assignment from Panama and Venezuela Finance Company to you?

A. Yes, sir.

Q. Is that what your testimony was?

A. Yes, sir.

Q. What do you mean that they are collateral?

A. I mean that the assignment stands on its own two feet and that assignment to me having been

made I have a perfect right to do with this claim and this cause of action as I please, including to drop it, [95] to forget it, to settle it, to file suit on it.

Q. Although the agreement which you signed prior to your receipt of the assignment makes reference to the filing of a suit, the payment of attorneys' fees, and the payment of net recovery, isn't that correct?

A. Out of an abundance of caution—yes, sir—it sure does say that, which I signed as an offer to them.

Q. Was this agreement an offer to Panama-Venezuela Finance Company?

A. I think—well—it was my last offer. I believe that has been agreed upon, Morris.

Q. When you say it was your last offer, do I understand you had some negotiations with them at the same time you submitted an earlier offer?

A. We may have—I know that Jack Banner and I discussed the 90% figure before this.

Q. And did you make an offer to Panama-Venezuela Finance Company to pay them 90% of any recovery?

A. As I recall I asked Mr. Banner if that would be agreeable with Panama-Venezuela Finance Company.

Q. And what did he tell you?

A. I'm not sure what he told me. I think he told me that he didn't think it would be agreeable with them, or he may have said "It isn't agreeable with them"—[96] I'm not sure.

Q. Do you know whether or not he discussed the matter of their getting 90% of any recovery with Panama-Venezuela Finance Company?

A. As you said before, I had the impression he did.

Q. And after they didn't take the 90%, do I understand you offered them 95%?

A. I don't know for sure if they refused to take the 90% or not. The 95% to my way of thinking was a fair way to do it. There were some negotiations but I was happy with the 95 and 5.

Q. And those were negotiations at a time prior to your receipt of the assignment from Panama-Venezuela Finance Company?

A. They were negotiations prior to the actual receipt of that agreement from Panama-Venezuela Finance—yes.

Q. Mr. Kramer, after you had had negotiations as to what percentage Panama & Venezuela Finance Company would get of any net recovery, you knew, did you not, that they expected suit to be instituted on this claim?

A. No, sir, I did not, and I did not expect it to be included either.

[97] Q. Is it your testimony that they were going to get 95 per cent of the recovery and that you had no obligation whatsoever to try to collect this item?

Mr. Banner:
Your Honor, that is ambiguous.

The Court:
I sustain the objection.

A. No, sir.

(By Mr. Harrell):

Q. Is it your testimony, Mr. Kramer, that you negotiated with Panama-Venezuela Finance Company in connection with the amount of percentage of the net

proceeds that they were to get, but that you had no obligation to try to collect this claim from Caribbean Mills?

A. No, sir, that's not what I mean. I did obligate myself to Panama-Venezuela Finance Company to use my best efforts to handle and prosecute this claim. However, if I didn't want to put a lot of money into it, I didn't want to go into hock the rest of my life for it—at the same time I didn't expect them to just completely sit there and say, "Take it all for the $1 plus your promises to prosecute the claim, plus your indemnity agreement," and there were brief negotiations—I finally told Jack, or Jack and I talked it over and decided that was one way to do it—was by paying a bonus, and I thought that that was fair, but the bonus—this collateral agreement was to have [98] nothing to do with the assignment.

Q. The agreement marked Defendant's Exhibit 1, makes reference to the assignment, does it not?

A. The agreement makes reference to the assignment, but the assignment does not make reference to the agreement, as I recall.

Mr. Banner:

Your Honor, again the instrument speaks for itself and would be the best evidence.

The Court:

Let him answer the question.

(By Mr. Harrell):

Q. The agreement marked DX-1, recites, "It is hereby collaterally agreed that in the event of payment or recovery on said contracts by Clayton S. Kramer,"—to what instrument was the agreement collateral?

A. The agreement was collateral to the assignment from Panama-Venezuela to me. The agreement contained a personal promise which was not to be connected with or to interfere with the assignment to me.

Q. Mr. Kramer, I believe I have asked you about whether or not you had conversations with anyone with Panama-Venezuela Finance Company at the time of the assignment and agreement. I would like to ask you if you had any conversations with anybody with Panama-Venezuela Finance Company since the assignment?

A. No, I have not.

[99] Q. Do you know anything about the facts in this case, Mr. Kramer, other than what Mr. Banner has told you?

A. No, except some facts that I gathered from some—a couple of letters that may—you know—have been written back there early in 1959.

Q. But those letters were not to you or from you, were they?

A. Oh, no, and of course some facts I have gathered from looking through the pleadings and the depositions and the papers on file.

Q. Those are facts that you have gathered from some source other than your own knowledge?

A. Yes, they are—that's correct.

Q. Mr. Kramer, who prepared the assignment and the agreement?

A. I believe Mr. Banner did, I'm quite sure of it.

Q. Mr. Kramer, was there anything ever said to you at the time when you and Mr. Banner were talking about this contract or this claim about bringing suit in Federal Court?

A. No, sir.

Q. Was there anything said to you or relating to the matter of the Federal Court—a Federal Court [100] suit on this claim?

A. You—no, sir, there wasn't.

Q. At any time?

A. Before suit was filed?

Q. Yes.

A. Whether before demand it was filed—no. While we were discussing the possibility of acquiring the claim—no, sir.

Q. Was there any discussion about the filing of the suit in Federal Court prior to its being filed?

A. Yes—I know there was some talk about the suit, or, I believe we discussed where it would be filed, which Court, but that was shortly before suit was filed. It was after the demand was rejected.

Q. Was there ever any discussion as to why Panama-Venezuela Finance Company didn't file this suit against Caribbean Mills?

A. No, sir.

Mr. Banner:

Your Honor, that would be completely immaterial and irrelevant, hearsay, and everything else, and solve no ultimate issue in this case.

The Court:

I'll overrule the objection—he has answered the question.

(By Mr. Harrell):

Q. Do you know whether or not [101] Mr. Banner had any discussions with Panama-Venezuela Finance Company with respect to the institution of the suit on this claim in Federal Court?

A. No, sir, I honestly don't know if he did or not.

Mr. Harrell:

Your Honor, I don't think of any questions that I want to ask of this witness under these circumstances. It might be that I would have wanted this to—Well, it might be that I would have one or two questions that might be asked in the presence of the Jury tomorrow.

The Court:

All right, if you will be on the witness stand at 9:00 o'clock.

Mr. Banner:

May I ask one or two questions in relation to some—to this matter at this time, Your Honor?

The Court:

Yes.

RE-DIRECT EXAMINATION

By Mr. Banner:

Q. Mr. Kramer, I want you to tell the Court whether or not Panama-Venezuela Finance Company has exercised any control, management, or supervision of the means or manner in which you have handled or prosecuted the claim under the agreement marked Plaintiff's Exhibit 1?

[102] A. No, absolutely not. That is the way I wanted it to be when I acquired that claim.

Q. State whether or not at the time of the conversation between yourself and myself, and all times prior to the demand being made, any conversation was had as to the necessity of filing suit in order to enforce that contract?

A. No, there wasn't any. I didn't need to ask you. I knew of the Murchisons. I worked with the U.S. F&G., I knew of their reputation as a bonding company and an insurance company and the thought never occurred to me that they would welch on that agreement—one as clear as that. I didn't even ask you about it.

Mr. Banner:
That's all.

RE-CROSS EXAMINATION

By Mr. Harrell:

Q. Mr. Kramer, you never communicated with anybody from Panama-Venezuela Finance Company in connection with this matter either before or after the assignment, have you?

A. No.

Q. And you don't know what communications, if any, may have taken place between any representatives of that company and Mr. Banner, do you?

A. No. I know about the letter of transmittal—[103] naturally.

Q. But other than that, you don't, do you?

A. No, sir, I don't think I do.

Q. And you do know that they entered into an agreement with respect to the amount of the attorneys' fees that should be paid in connection with this case, don't you?

A. I entered into an agreement whereby I personally promised to pay them a certain sum, and I left myself room for the possibility of attorneys' fees.

Q. I'm sorry—but as far as the control and management and so forth, Mr. Kramer, Panama &

Venezuela Finance Company entered into an agreement with you by which they authorized the amount of Mr. Banner's law firm for a 33 and 1/3 per cent fee, didn't they?

A. No, sir.

Mr. Banner:

If it please the Court, the instrument speaks for itself and it is the best evidence.

The Court:

I sustain the objection.

(By Mr. Harrell):

Q. You didn't know, as I understand it, from your answers to questions by Mr. Banner that there would be a necessity as to suit, is that correct?

A. No, sir, I didn't know that there would be.

[104] Q. But you knew you might have to bring a suit?

A. That's what I meant when I said it was in the back of my mind. Obviously it's going to be in the back of a person's mind nearly any time he does anything.

Q. And you knew yourself in the back of your mind you might have to bring suit on this claim?

A. Yes, but this was a long way back.

Q. Nevertheless, it was there, wasn't it?

A. Yes—it was there.

Q. And when you said that, you didn't know that the Murchisons would welch on that agreement, I thought you said a few minutes ago that you knew nothing about the facts in this case as far as the original transactions were concerned?

A. I believe I testified that of my own personal knowledge I did not know any of the facts. As I recall that is what I testified to, and with regard to this matter of retaining an attorney, it was in my mind at the time that I was going to make whatever demands I made through an attorney. In other words, that clause about retaining an attorney is in there—to make the demand.

Q. From your knowledge you don't know—you didn't know then and you don't know now whether or not [105] the Murchisons have lived up to any contractual agreement that they have, isn't that a fact?

A. Mr. Harrell, I have a pretty good idea from what I have seen in the lawsuit and in the depositions. Of my own personal knowledge, I know that I have never received a dime from them—that's right.

Q. And you have no knowledge of the facts as they existed at the time of the transaction?

Mr. Banner:
Your Honor, this is repetitious.

The Court:
I sustain the objection.

Mr. Harrell:
That's all, Your Honor.

The Court:
All right, I will see you at 9:00 o'clock in the morning.

(At this time the proceedings recessed for the evening recess and resumed as hereinafter shown.)

[106] Proceedings.

Thursday, May 26, 1966.
Dallas, Texas.

(Jury in jury box.)

The Court:
Good morning. Have you finished with Mr. Kramer or not?

Mr. Harrell:
No, Your Honor, I have a few more questions to ask.
If I have not already offered them, I now offer Defendant's Exhibits 1, 2, and 3.

Mr. Banner:
We would object to the submission of Defendant's Exhibit 1, to the Jury, it being completely collateral to this matter.

The Court:
I will read it and you may go ahead.

CLAYTON S. KRAMER, the witness heretofore named, having been previously sworn, testified further on his oath as follows:

RE-CROSS EXAMINATION – (Continued):

By Mr. Harrell:
Q. Mr. Kramer, have you in any way communicated with any persons who are connected in any way with Panama-Venezuela Finance Company?
A. Not personally—no.

[107a] Q. At no time, sir?

A. At no time.

Q. That includes both before and after the filing of this lawsuit?

A. That's correct.

Q. Have you at any time communicated with Mr. Roy Kelly?

A. No, sir.

Q. Have you in any way personally communicated with Mr. Roy Cohn?

A. No, sir.

Q. And have you communicated in any way with Mr. Eduardo Alfaro?

A. No, sir.

Q. Do you know Mr. Eduardo Alfaro?

A. No, sir, I do not.

Q. Mr. Kramer, I show you what has been marked as Plaintiff's 4 and entitled "Assignment," and ask you whether you know of your own knowledge whether or not that instrument bears the signature of Eduardo Alfaro?

A. I know that he has sworn that it is his signature. Of my own personal knowledge—no—I don't know that that is his signature.

Q. Where has he sworn that that is his signature?

[107b] A. In his deposition.

Mr. Harrell:

We would again object to that comment by the witness as to what Eduardo Alfaro has sworn in his deposition.

My question was whether or not this witness knows.

The Court:

I sustain the objection.

(By Mr. Harrell):

Q. You do not know, Mr. Kramer, of your own knowledge whether or not Eduardo Alfaro executed or signed this assignment marked Plaintiff's Exhibit 4?

A. No, sir, I did not see him sign it.

Q. It was signed out—it was not signed in your presence?

A. No, sir.

Q. And you don't even know him?

A. No, sir, I don't.

Q. And you don't know his signature, do you?

A. Not from having seen him sign any instrument in my presence.

Q. Mr. Kramer, this instrument (referring to Plaintiff's Exhibit 4) recites that Panama-Venezuela Finance Company for and in consideration of $1 and other good and valuable consideration "receipt of which is hereby acknowledged, does hereby assign, [108] sell, and convey to Clayton S. Kramer," and so forth—what is the other good and valuable consideration?

Mr. Banner:

May it please the Court, I think the Court has already instructed counsel in that regard.

The Court:

I don't know that I have instructed him in that regard, but I sustain the objection.

Mr. Harrell:

Your Honor please, in the light of the Court's ruling, I desire to ask Mr. Kramer some questions with

respect to what has been marked Defendant's Exhibit 1, for the purpose of showing the interest of Eduardo Alfaro and Panama-Venezuela Finance Company in this action, in view of the facts that the testimony of Mr. Eduardo Alfaro has been admitted in evidence over our objection.

The Court:

I am not going to discharge the Jury at this time. Now, you may do that at some later time.

Defendant's Exhibit 1 will be admitted for the Court and not for the Jury.

Mr. Banner:

Thank you, Your Honor.

Mr. Harrell:

Your Honor, do I understand that at my request, the purpose of interrogating that witness for that purpose is denied?

[109] The Court:

Yes,—in the presence of the Jury.

Mr. Harrell:

Note our exception.

(By Mr. Harrell):

Q. Mr. Kramer, do you know of your own personal knowledge of any of the facts in connection with the negotiation and the execution of this agreement entered into as of the 30th day of May, 1959?

A. Of my own personal knowledge—I do not.

Q. Isn't it a fact that the first time you ever heard

of this instrument, Plaintiff's Exhibit 1, entered into as of the 30th day of May, 1959, was in 1964?

A. That's correct.

Mr. Harrell:

I believe that is all.

Mr. Banner:

No further questions.

The Court:

All right, you may step down, Mr. Kramer.

(At this time the Witness Kramer departed the witness stand.)

* * *

CLAYTON S. KRAMER, having been previously sworn, testified further on his oath as follows:

DIRECT EXAMINATION

By Mr. Harrell:

Q. Mr. Kramer, you did execute an agreement, did you not, between yourself and Panama and Venezuela Finance Company by which Panama and Venezuela Finance Company was to have 95% of the proceeds or monies obtained from Caribbean Mills or others under and by virtue of the contracts?

A. No, sir. Do you want me to explain my answer to that?

[396] Q. Yes, if you will, sir?

A. I am personally obligated by virtue of this agreement to pay Panama and Venezuela Finance

Company a certain amount of money, the exact amount to be determined as set out in this agreement, but they have no interest in this lawsuit or this claim.

Q. Well, I'm not asking you for your construction of the agreement, Mr. Kramer, I'm really asking you in the interest of time whether you executed this agreement?

Mr. Harrell:

A. Yes—I executed that agreement, but your question included a construction.

Mr. Harrell:

I believe that this agreement has been marked as an exhibit, Your Honor,—it has been marked as Defendant's Exhibit No. 1

The Witness Kramer:

Yes—I executed that agreement.

Mr. Harrell:

Pass the witness.

Mr. Banner:

No questions.

The Court:

All right.

(At this point the Witness Kramer departed the witness stand.)

EXCERPTS FROM DEPOSITIONS

Deposition of Arthur Haas

DIRECT EXAMINATION

By Mr. Banner:

* * *

[4] A. I am an officer of several corporations in which the Investments Management Corporation is involved.

Q. Would you give us the names of those corporations, sir? A. Frankly, they are quite numerous. There are, my guess would be there are over 40 or 50 corporations involved, and I am afraid I couldn't give you the answer you asked for.

Q. Where do you maintain your offices for the purpose of doing business? A. 1201 Main Street.

Q. Dallas, Texas? A. Correct.

* * *

[5] Q. Now then, I'll ask you to state whether or not you are an officer of a corporation known as Caribbean Mills, Incorporated? A. Yes.

Q. And what is your particular capacity with that corporation? A. I'm president of that corporation.

* * *

[7] Q. Now, what is the business, or what is the purpose of Caribbean Mills, Incorporated? A. Manufacturer of flour and by-products.

Q. Now, what other kind or types of by-products does [8] it manufacture? A. Those by-products which are naturally incident to the making of flour.

Q. Would you give us some examples, sir? A. Mill feed.

* * *

[16] Q. Would you state the names of the directors of the corporation at this time? A. George Leger, Walter Spradley, Holman Jenkins, myself. I think that's all now. There may have been one more, I'm not sure.

Q. At this time you know of only four directors? A. I'm saying there may be—I'm not positive on that.

Q. All right, sir. A. I believe there are only—there are four or five directors, and I think those represent most of them.

Q. Mr. Holman Jenkins is also a resident of Dallas, Texas; is he not? A. To the best of my knowledge.

* * *

[32] Q. All right, sir. Mr. Haas, since you have been president of Caribbean Mills, have you arranged for any financing at the Mercantile National Bank here in Dallas? A. Yes, I have.

Q. For and in behalf of the corporation? A. Well, to answer your question specifically, mainly for and in behalf of Murchison Brothers.

Q. Did the corporation that you are president of, sign the note in question? A. Yes.

* * *

[34] Q. I'll ask you to state whether or not Caribbean Mills, Incorporated, have maintained a bank account in the State of Texas since the period of time you have been [35] president. A. Yes, they have.

Q. In what bank or banks? A. Well, let's see, they have numerous bank accounts all over, not just in the State of Texas. They maintain some accounts here in Dallas, Texas.

Q. Could you give us the names of the banks? A. Mercantile, First National and Republic.

* * *

[36] Q. (By Mr. Banner) I'll ask you to state whether or not any banking or financial institution has issued any letters of credit in behalf of Caribbean Mills, Incorporated, in the State of Texas, since you have been president. A. Yes, they have.

Q. On more than one occasion? A. Yes.

* * *

[37] Q. Have you, on occasion, signed checks in behalf of the corporation here in Texas? A. Yes, rarely.

* * *

[38] Q. When does Caribbean Mills acquire title to the wheat, at the time of purchase or when it reaches Haiti? A. Normally, the time it is loaded on the vessel in Duluth, Superior, Wisconsin, or Baltimore, Maryland, or wherever the wheat is loaded.

Q. Is any of the wheat used by the flour mill loaded in Galveston or Houston, Texas? A. I have known of an occasion for it to be loaded there.

* * *

[40] Q. Are the physical structures and assets of the corporation insured? A. Yes, they are.

Q. By whom are they insured? A. I believe it's Hanover Insurance Company. We have shifted this policy around a few times.

Q. Who is the agent that wrote the policy? [41] A. Kenneth Murchison & Company.

Q. And where is Kenneth Murchison & Company located? A. In Dallas.

* * *

[56] Q. All right, sir. Quite simply: Who exercises the final and executive decision making powers in relation to this corporation? A. I would say the creditors of the corporation.

[57] Q. And who are the creditors? A. Murchison Brothers. I would say the banks that loan us money have quite a bit to say about what we do, the Royal Bank of Canada, and others.

Q. Are all of the obligations of the Caribbean Mills, Incorporated, endorsed or guaranteed by Murchison Brothers, or the Murchison interests? A. I know of very, very few of any substance that are not guaranteed or collateralized by the Murchisons.

Deposition of Walter M. Spradley

DIRECT EXAMINATION

By Mr. Mock:

* * *

[26] Q. Now, what office do you now hold? A. Vice-president and assistant secretary.

* * *

[28] But apparently I was mistaken in saying that it was incorporated in 1955, because what I did find is a letter dated January 19, 1956, addressed by R.B. Kelly to George N. Leger, instructing him in respect to various matters and capitalization and so forth, in which he says that he, he lists the directors and officers who are to be the initial directors and officers, and those are Roy B. Kelly—these are the directors, Roy B. Kelly, Cecil B. Hagen, Harry A. Grebbe, J. Wilbur Neptune and Max Dennis. The original officers were to be Roy B. Kelly, president, C. B. Hagen, vice-president, Harry A. Grebbe, vice-president and Walter M. Spradley, secretary and treasurer.

Q. All right. Now, where did those gentlemen live, Walter? Take the officers first. A. Roy B. Kelly, to the best of my knowledge, lived in Washington, D.C. at the time. Cecil B. Hagen, I believe, lived in New York, or Washington. I'm not sure which.

Q. Didn't Mr. Hagen live in Galveston, Texas? A. I think Mr. Hagen was originally from Galveston, Texas, but I'm sure he was not living there then. I'm not sure either because I don't know where he lived.

Q. All right. Go ahead. A. But Harry A. Grebbe, I think, lived in Houston, Texas. And I lived in Dallas.

* * *

[32] Q. Have you ever signed any contracts in your capacity as an officer of Caribbean Mills? A. The only contract I can recall having signed is the one in question here.

* * *

[33] Q. Now, the one in controversy here, the one upon which the lawsuit is based, where were you physically at the time you signed it? A. I think in Dallas.

* * *

[48] A. I think initially the money, the principal money was borrowed from the Mercantile National Bank and Allis Chalmers Manufacturing Company.

Q. All right. About what amount was borrowed from [49] the Mercantile National Bank?

That's here in Dallas, of course?

Deposition of Clint Murchison, Jr.

DIRECT EXAMINATION

By Mr. Banner:

* * *

[5] Q. For the purpose of the record, will you tell me your name? A. Clint Murchison, Jr.

Q. And where do you reside, please, sir? A. In Dallas.

Q. And what is your address here in Dallas? A. 6200 Forest Lane.

Q. And do you maintain offices for business purposes here in Dallas? A. Yes sir.

Q. And where are those offices located? A. 1201 Main Street.

Q. Now then, you are one of the owners of Caribbean Mills, Incorporated; are you not? A. Yes.

Q. Is your participation in the ownership of Caribbean Mills by way of a joint agreement with your father [6] and brother, or do you have an individual interest in Caribbean Mills, Inc.? A. The stock is owned by Murchison Brothers, a partnership of my brother and myself.

* * *

[12] Q. When is the first time that you individually had any particular relationship with this corporation? A. Well, it was sometime after it was formed, and after the plans had been prepared to build the mill, somebody contacted me and said that a mill was going to be built down there in a company in which my family has an interest and of which I'm president, was interested in building it or expressed—I mean they said, "Are you interested in building it?" And I said, "Yes".

Q. As a construction proposition? A. Yes.

Q. Now, what corporation or firm was this? [13] A. Tecon Corporation.

* * *

Q. And where did this first contact take place, Mr. Murchison? A. Probably in my office.

Q. Here in Dallas? A. Yes.

* * *

[14] Q. I'll ask you to state whether or not this discussion later ended up in Tecon building the particular flour mill or plant? A. It did.

Q. And with whom was the contract of construction signed? A. You mean what company?

Q. Yes sir. A. I don't remember. It was one of either Caribbean Mills or this Societe Haitienne.

Q. All right. The predecessor in name? A. Yes.

Q. Whichever name it was going by at that time? A. Yes.

[15] Q. Signed a contract with Tecon, your construction company, to actually construct the flour mill in question? A. Yes.

Q. And that contract was drawn and signed here in Dallas, Texas; was it not? A. I don't know where it was drawn. I presume it was signed here.

* * *

[38] Q. Mr. Murchison, who actually decides the company policy in relation to the scope, or nature of activity? A. Its creditors.

Q. And who are its creditors then? A. My brother and myself.

Q. Would you in turn transmit your wishes in this regard to Mr. Haas and he in turn see that they were carried out? A. Yes.

Q. And that's done here in Texas? [39] A. That's done here in Dallas.

JUDGMENT

Filed Jul. 6, 1966.

[Caption Omitted in Printing]

Be It Remembered that on the 25th day of May, A.D. 1966, the above styled and numbered cause was called for trial by the Court; that both sides appeared and announced ready and thereafter a Jury was selected. After the Jury was impaneled, the case proceeded to trial with both sides presenting testimony and evidence.

That thereafter, on the 27th day of May, A.D. 1966, the parties completed their presentation of testimony and evidence and the Court, charged the Jury and submitted Special Interrogatories for the Jury to answer. Thereafter, the Jury retired and deliberated upon its Verdict.

At approximately 4:15 o'clock P.M., May 27, 1966, the Jury returned their Verdict into Court. Such Verdict was duly signed by Mr. Easterwood, Foreman of the Jury. Such Jury Verdict consisting of Answers to Special Interrogatories as follows:

"Special Issue No. 1:

Do you find from a preponderance of the evidence that Roy Kelly assigned all of his interest in the Agreement of May 30, 1959, except for any interest he had in the $85,000 cash payment, to Panama and Venezuela Finance Company?

Answer 'yes' or 'no'.

Answer Yes.

Special Issue No. 2:

Do you find from a preponderance of the evidence that Panama and Venezuela Finance Company assigned all its interest, if any, under the May 30, 1959 Agreement to Clayton Kramer?

Answer 'yes' or 'no'.

Answer Yes.

Special Issue No. 2-a:

What do you find from a preponderance of the evidence to be the amount, if any, of the interest, if any, of Panama and Venezuela Finance Company at the time of the assignment, if any, of its interest under the May 30, 1959 Agreement to Clayton S. Kramer?

Answer in dollars, if any, and cents, if any.

Answer $165,000.00.

Special Issue No. 3:

Do you find from a preponderance of the evidence that all the parties who entered into the May 30, 1959 agreement intended at the time the agreement was negotiated and executed that the $165,000 in payments would be subject to and pledged as security for the Roy Kelly indebtedness to Sid Richardson?

Answer 'yes' or 'no'.

Answer No.

Special Issue No. 4:

Do you find from a preponderance of the evidence that Roy Cohn or Roy Kelly with knowledge of the rights, if any, of Panama and Venezuela Finance Company represented to Caribbean Mills, Inc. that the Finance Company claimed no further interest in or right to any further payments under the Agreement of May 30, 1959?

Answer 'yes' or 'no' as to each:

(a) Roy Cohn No.
(b) Roy Kelly No.

If you have answered either (a) or (b) of special issue no. 4 'yes', then answer special issue nos. 5 and 6. Otherwise, do not answer special issues nos. 5 and 6.

Special Issue No. 5:

Do you find from a preponderance of the evidence that Roy Cohn or Roy Kelly had apparent authority to make such representations, if any, for Panama and Venezuela Finance Company?

Answer 'yes' or 'no' as to each.

(a) Roy Cohn .....
(b) Roy Kelly .....

Special Issue No. 6:

Do you find from a preponderance of the evidence that Caribbean Mills, Inc. relied on such representations, if any?

Answer 'yes' or 'no'.

Answer .....

Special Issue No. 7:

Do you find from a preponderance of the evidence that Panama-Venezuela executed the agreement of May 30, 1959 believing it to be the full and only agreement between Roy Kelly, Caribbean Mills, and Panama-Venezuela?

Answer 'yes' or 'no'.

Answer Yes.

Special Issue No. 8:

Do you find from a preponderance of the evidence that Caribbean Mills intentionally omitted matters from the contract in question?

Answer 'yes' or 'no'

Answer Yes.

If you have answered special issue no. 8 'yes', then answer special issue no. 9. Otherwise, do not answer special issue no. 9.

Special Issue No. 9:

Do you find from a preponderance of the evidence that Caribbean Mills failed to inform Panama-Venezuela that matters had been intentionally omitted from the contract in question, if you have so found?

Answer 'yes' or 'no'.

Answer Yes.

If you have answered special issue no. 8 'yes' then answer special issue no 10. Otherwise do not answer special issue no. 10.

Special Issue No. 10:

Do you find from a preponderance of the evidence that Panama-Venezuela would not have executed the contract in question had they known matters had been intentionally omitted, if you have so found, by Caribbean Mills?

Answer 'They would not have' or 'They would have'.

Answer They would not have."

That such Verdict was accepted by the Court and ordered filed.

The Court have considered the Verdict of the Jury, the testimony and evidence introduced into evidence during the trial and the law applicable hereto, is of the opinion that the Verdict of the Jury, the facts and the law are with the Plaintiff, and therefore, finds that the Plaintiff is entitled to and should receive Judgment against the Defendant herein in the sum of One Hundred Sixty-five Thousand Dollars ($165,000.00).

It is, therefore, Accordingly Ordered, Adjudged and Decreed that the Plaintiff, Clayton S. Kramer, has and is hereby granted Judgment against the Defendant, Caribbean Mills, Inc., a corporation, in the sum of One Hundred Sixty-five Thousand Dollars ($165,000.00); that in addition thereto, the said Plaintiff is entitled to and is hereby granted Judgment against the Defendant for interest at the rate of six percent (6%) on such sum of One Hundred Sixty-five Thousand Dollars ($165,000.00) from the date of entrance herein until such sum be fully paid and discharged. It is further Ordered, Adjudged and Decreed that all costs of this action be and they are hereby taxed against the Defendant, Caribbean Mills, Inc.

For such sums and amounts let execution enter. To all of which action the Defendant excepts.

Entered this the 6th day of July A.D. 1966.

SARAH T. HUGHES,
District Judge.

Approved as to form:

MORRIS HARRELL,
(Morris Harrell),
Attorney for the Defendant.

JACK BANNER, Atty. for Plaintiff.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24090

CARIBBEAN MILLS, INC.,
Appellant,

versus

CLAYTON S. KRAMER,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(January 26, 1968.)

Before BROWN, Chief Judge, and BELL and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: Because we conclude that the requisite diversity of citizenship does not exist in this case, it will not be necessary to recite the facts in great detail. Appellant, Caribbean Mills, Inc., is a foreign corporation organized under the laws of Haiti where it operates a flour mill. On May 30, 1959, it entered into a written agreement with a man named Kelly from Washington, D.C. and the Panama and Venezuela Finance Company, a for-

eign corporation organized under the laws of Panama. Under the terms of the agreement, appellant was to purchase from Panama 125 shares of corporate stock for a down payment of $85,000 plus installment payments amounting to an additional $165,000. Because of subsequent developments and appellant's interpretation of the contract in light of these developments, the installment payments were never made.

On September 21, 1964, Panama and Kelly assigned their interests under the 1959 contract to Clayton Kramer, an attorney in Wichita Falls, Texas and appellee here. The consideration was $1.00. By separate instrument executed on the same day, Mr. Kramer reassigned 95% of his newly acquired interest to Panama.[1] Thereafter, he filed suit against Caribbean Mills for $165,000 in the United States District Court for the Northern District of Texas.[2] The trial judge overruled appellant's motion to dismiss on jurisdictional grounds and proceeded to trial. The question of contract interpretation was submitted to a jury, which returned a verdict in favor of appellee for $165,000. In appealing the judgment entered on this verdict, Caribbean Mills urges, *inter alia*, that the sole purpose of the assignment from Panama to Kramer was to create diversity of citizenship under 28 U.S.C. § 1332 (a)(2) (suit between citizen of

[1] Under the second instrument, Kramer had the right to pay his attorney 33-1/3% of any recovery. He was to retain 5% of the remainder and pay Panama 95% as a "bonus."

[2] There is no question that appellant had sufficient business contacts in Dallas, Texas to render itself amenable to process in the Northern District.

a state and citizen of a foreign state) and that such a tactic brings into play 28 U.S.C. § 1359, which says that a federal court shall not have jurisdiction where a party "by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." On oral argument before this Court, counsel for appellee made no particular effort to deny that Mr. Kramer is simply an assignee for purposes of collecting Panama's claim in federal court, but he argued that the assignment from Panama is valid on its face and that under the decided cases the motives for making it are of no import. Because we believe that 28 U.S.C. § 1359 has more force than appellee is willing to admit, we must reverse and remand with directions to dismiss for want of jurisdiction. While it may seem wasteful to divest the federal courts of jurisdiction after judgment has been entered on a jury verdict, there are deeper considerations which compel this result. In construing the very statute before us, the Tenth Circuit said,

> But, after all, it is the words of a federal statute we construe in the context of an historical purpose to deny diversity jurisdiction when it would operate to serve a purpose which is unsuited to the good order of federal court administration.

Bradbury v. Dennis, 10th Cir. 1962, 310 F.2d 73, 76.

I.

By assigning its interest under the contract and obtaining a reassignment of 95% of that interest on the same day, Panama obviously intended to designate Kramer as a collection agent with the capacity to sue in federal court. To construe these transactions in another way would require serious departure from any traditional notion of reality. The question presented, then, is whether under Section 1359 an assignee for collection purposes can properly invoke federal jurisdiction. In our view, he cannot do so because the assignment to him was made for the purpose of creating federal jurisdiction without divesting the assignor of his interest in the law suit. To support this conclusion, we must delve into the history of Section 1359 and some of the old cases.

Broadly speaking, Section 11 of the Judiciary Act of 1789 denied federal jurisdiction to an assignee of a cause of action if it was unavailable to his assignor, i.e., if his assignor could not have brought the same suit in federal court. With changes in language, the "assignee clause" remained a part of the law until 1948. Wright, *Federal Courts* § 31, at 85 (1963 ed.). Section 37 of the Judicial Code of 1911, which stemmed from the Act of 1875, commanded the dismissal or remand of an original or removed action when the parties had been "improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable." 3 J. Moore, *Federal Practice* ¶ 17.05, at 1319 (1967 ed.).

In the 1948 Judicial Code, the Reviser condensed these two sections into Section 1359, the statute we have today. The Reviser's Notes indicate that the purpose of condensing the two sections into one was twofold: To eliminate confusing and unnecessary exceptions to the assignee clause and to eliminate the effect of that clause on bona fide assignees. Under the original clause, a bona fide assignee could not sue in federal court unless his assignor could have; under Section 1359, any assignee can sue in federal court so long as he was not improperly or collusively made a party in order to invoke federal jurisdiction. The Reviser's Notes do not suggest any other change in law or policy.

With this legislative background in mind, we turn to the pre-revision cases. These cases clearly reveal that the device employed by Panama would not have passed muster under pre-revision statutes. *Williams v. Nottawa*, 1881, 104 U.S. 209, 26 L.Ed. 719, involved an action against a township upon township bonds payable to bearer. Williams, the plaintiff, sued on three of the bonds as owner; but the rest of them had been transferred to him for collection purposes by citizens of Michigan, the state in which the township was located. The Supreme Court held that the transfer was colorable in the sense that it was never intended to change the ownership and was made only for the purpose of "creating a cause cognizable in the courts of the United States." The suit was therefore dismissed as being in contravention of the policy of the Act of 1875. The Reviser's Notes do not indicate

that the policy of dismissing under these circumstances was changed by the enactment of Section 1359.

Two later cases following *Williams v. Nottawa* lend further support to the principle that a federal court has no jurisdiction over an action brought by a collection agent to whom an assignment or transfer has been made for the purpose of creating diversity. In *Southern Realty Investment Co. v. Walker*, 1909, 211 U.S. 603, 29 S.Ct. 211, 53 L.Ed. 346, some Georgia attorneys had created a dummy corporation in South Dakota that was used as an agent to collect the claims of Georgia citizens against Georgia citizens in federal court. The Supreme Court held that under the Act of 1875 a diversity suit could not be maintained by the corporation in behalf of Georgia citizens. In *Central Paper Co. v. Southwick*, 6th Cir. 1932, 56 F.2d 593, Southwick had been assigned four claims for $1.00 each so that he could bring suit in federal court. He, like Mr. Kramer in the case at bar, appears to have arranged a fee for his efforts to collect. While it is not clear from the opinion that the reason for the assignments was to create diversity of citizenship, the court observed that the Act of 1875 and cases like *Williams v. Nottawa* prohibited "assignments of the technical legal titles to claims to plaintiffs for the purpose of permitting them to bring suits in federal courts for the purpose of collecting the same." 56 F. 2d, at 596. It found the four assignments to be colorable or fictitious and hence improperly made to invoke federal jurisdiction.

The three cases just discussed are factually similar to the instant case and serve to demonstrate that courts interpreting the Act of 1875 considered an assignment for the purpose of enabling collection in federal court to be improper within the meaning of the statute. Three other cases, which are not so similar factually but perhaps more well-known, are illustrative of the same proposition. In *Lehigh Mining & Mfg. Co. v. Kelly*, 1895, 160 U.S. 327, 16 S.Ct. 307, 40 L.Ed. 444 and in *Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 1908, 211 U.S. 293, 29 S.Ct. 111, 53 L.Ed. 189, stockholders of one corporation transferred fee title in land to a sham corporation in another state without valuable consideration for the purpose of creating federal jurisdiction. In *Miller & Lux*, the Court summarized the transaction as follows:

> . . . the transfer of the property of the California corporation to the Nevada corporation was merely formal,—only a device by which to have the rights asserted by the California corporation in a state court determined by the Federal court rather than by the state court. The agreement that all the property of the California corporation should be transferred to the Nevada corporation was attended by the condition that all the capital stock of the new corporation should be issued—and it was issued—to the California corporation, which remained in existence with full power, as the owner of such stock, to control the operations of the Nevada corporation.

211 U.S., at 304, 29 S.Ct., at 114. The Court held that the Nevada corporation was collusively made plaintiff in the suit for the purpose of creating federal jurisdiction and therefore that jurisdiction failed under the Act of 1875. The reason jurisdiction failed was not that the California corporation made a transfer with the motive of getting into federal court but rather that the transfer was colorable, indeed a sham, and was undertaken in order to create federal jurisdiction. In terms of the statute, the California corporation acted improperly or collusively to invoke jurisdiction of the court. We stress the importance of a colorable or fictitious transfer to the meaning of these cases because in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 1928, 276 U.S. 518, 48 S. Ct. 404, 72 L.Ed. 681, a very similar case, the Court made an often-quoted statement to the effect that it would not inquire into the motives behind the particular transfer. In that case, the Court found that the transfer was actual inasmuch as the transferor corporation had been dissolved. Having made this finding, it said the existence of a motive to create diversity jurisdiction by the transfer was not fatal.

The cases involving reincorporation in another state are relevant insofar as they show that the Act of 1875 and its successors to 1948 prohibited colorable transfers effected for the purpose of invoking federal jurisdiction. More to the point are the collection-agent cases, for they prove conclusively that under pre-revision law the arrangements between Panama and

Kramer would not have invoked federal jurisdiction. The critical question for this Court, therefore, is whether Section 1359 of the 1948 Judicial Code changed the law. Although language in *Corabi v. Auto Racing, Inc.*, 3d Cir. 1959, 264 F.2d 784, and *City of Eufaula, Alabama v. Pappas*, M.D. Alabama 1963, 213 F. Supp. 749, may imply that the law has changed, the correct answer must be that the law is the same today as it was in 1881 when *Williams v. Nottawa* was decided. The Reviser's Notes indicate that Section 1359 was designed to eliminate some of the defects of the assignee clause, but they do not reflect any change of policy with respect to the Act of 1875 and its successor statutes. While it might be argued that the revised section places greater emphasis on the fact that its application is limited to improper or collusive arrangements, the Reviser's Notes do not suggest a legislative intent to narrow the effect of court decisions previously discussed. In *Fourco Glass Co. v. Transmirra Products Corp.*, 1957, 353 U.S. 222, 77 S.Ct. 787, 1 L.Ed.2d 786, the Supreme Court said that an alteration or condensation of a statute in 1948 did not change the law unless an intention to change was clearly expressed:

> Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such change is clearly expressed.

353 U.S., at 227, 77 S.Ct., at 790. This rule for interpreting the 1948 revision in light of pre-revision law was later reiterated by Justice Goldberg in Chambers. *United States v. FMC Corporation,* 1963, 84 S.Ct. 4, 7.

II.

Appellee's reliance is not really on the argument that Section 1359 changed the law but rather is on the proposition that both the old statutes and the revised version have very narrow application. He points especially to the implication of the *Black & White Taxicab* case, *supra,* that a motive to create federal jurisdiction by reincorporating in another state did not contravene the Act of 1875. As was stated previously, the Court made this statement after having found that the transfer from one corporation to another was real and absolute. While it is true that *Black & White Taxicab* presents a conceptual problem in that the same people no doubt controlled both the dissolved corporation and the newly created one, it must nevertheless be inferred from the opinion that a critical distinction is to be made between actual and colorable transfers. In the instant case, the assignment was colorable in the sense that it did not divest Panama of its interest in the lawsuit. To repeat, Mr. Kramer, the assignee, is nothing but a collection agent who was not involved in and is not knowledgeable about the events leading up to the lawsuit and who has no interest in it aside from his fee. The thrust of *Lehigh Mining* and other cases discussed to this point is that an assignment of this kind made

for the purpose of invoking federal jurisdiction is improper or collusive within the meaning of the statute.

Admittedly, we find some uncertainty in post-revision cases. In *Bradbury v. Dennis, supra,* for example, jurisdiction was sustained as against a contention that the assignment from an insolvent corporation to its nonresident sole stockholder was improper or collusive. Since the transfer was supported by adequate consideration and since there was nothing "surreptitious or fictitious" about it, the court felt that the proscription of Section 1359 was inapplicable. In *Steinberg v. Toro,* D. Puerto Rico 1951, 95 F. Supp. 791, on the other hand, the court dismissed for want of jurisdiction because it considered an assignment from a Puerto Rican corporation to its president, director, and stockholder in New York to be improper. The transaction was found to lack reality:

> . . .it must be concluded that neither the Corporation or the plaintiff ever intended or considered that the assignment, if made, operated so as to completely divest the Corporation of all interest in and power of control over the contract or any rights under it. And the close identity that exists between the plaintiff and the Corporation is likewise convincing that the Corporation has a residual power of control over the contract or any rights under it which is inconsistent with the idea of a real and absolute assignment thereof to the plaintiff.

95 F. Supp., at 797. The court concluded that Congress did not intend to confer jurisdiction on federal courts in cases where diversity of citizenship is achieved by pretense. These cases are more difficult than the instant case because each of them involved an assignee with an interest in the company for which he prosecuted a claim in federal court. In neither case could it be said that the assignee was a mere collection agent who had never even been informed about the nature of the controversy. Despite this distinction, however, *Bradbury v. Dennis* seems difficult to reconcile with pre-revision cases such as *Lehigh Mining*. In *Bradbury*, a Colorado corporation assigned its claims to its nonresident stockholder in order to create diversity; yet it does not appear that the corporation was dissolved or that it really divested itself of any interest in the claims.[3]

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[3] As we have suggested, in a situation where a corporation, without giving up its interest, assigns a claim to a stockholder in order to create diversity, the proscription of Section 1359 should apply. A case of this kind should be distinguished from cases in which there is no assignment or other device employed to create diversity and in which the party filing suit has a substantial interest. In *Matthies v. Seymour Mfg. Co.*, D. Conn. 1958, 23 F.R.D. 64, for example, the court overruled an objection to jurisdiction based on Section 1359 because it found that the nonresident plaintiff, as owner of contingent interests in the two trusts involved, had a substantial stake in the litigation. The fact that one of his relatives had a greater interest and had underwritten the costs of litigation was not deemed controlling. The court found no evidence that the plaintiff had actually surrendered control over the conduct of the suit. Similar reasoning was used to sustain jurisdiction in a later case decided by the same court. *See Allstate Ins. Co. v. Lumbermens Mut. Cas. Co.*, D. Conn. 1962, 204 F. Supp. 83.

In *Amar v. Garnier Enterprises, Inc.*, C. D. Calif. 1966, 41 F.R.D. 211, the court dismissed a stockholder's derivative suit on the ground that the plaintiff had been made a stockholder solely for the purpose of enabling him to bring a

While the assignment of a claim from corporation to non-resident stockholder presents a vexing problem, still more troublesome is the appointment of a foreign administrator or executor. In *Gorabi v. Auto Racing, Inc., supra,* it was conceded that the resident administratrix had resigned in favor of a nonresident administrator for the sole purpose of creating diversity. The court upheld jurisdiction, saying that it was not prohibited by Section 1359.[4] The case is troublesome because it is difficult to argue with the result despite the fact that the real party in interest appointed a nonresident administrator for the single reason that she wanted the case to be tried in federal court. The result is supported by the rule that the decree of a state probate court naming an administrator cannot be collaterally attacked because of the purposes and motives of the parties when they practiced no fraud upon the court. *Mecom v. Fitzsimmons Drilling Co.*, 1931, 284 U.S. 183, 52 S.Ct. 84, 76 L. Ed. 233. Since the *Mecom* case precluded a collateral attack in federal court on Mr. Corabi's appointment as administrator, the court had no basis for labeling

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diversity derivative suit. He knew nothing about the suit and would have had no control over it. This case and *Matthies v. Seymour Mfg. Co.* appear to be correctly decided. In each, the court determined whether there had been an improper or collusive arrangement to secure federal jurisdiction by asking whether the nominal plaintiff had a substantial interest in the lawsuit or was just a stand-in for some nondiverse party.

[4] Faced with almost identical facts, a number of courts have reached the same result as did the Third Circuit in *Corabi. See, e.g., Lang v. Elm City Construction Co.*, 2d Cir. 1963, 324 F.2d 235; *Todd County, Minn. v. Loegering*, 8th Cir. 1961, 297 F.2d 470; *Stephan v. Marlin Firearms Co.*, D. Conn. 1963, 217 F. Supp. 880.

that appointment as improper or collusive within the meaning of Section 1359.

Were it not for the court's discussion of the meaning of Section 1359, we would not dwell on the *Corabi* case but would simply distinguish it as involving an appointment immune from collateral attack. The problem is that the court defined "improper or collusive" so that the statute would have very narrow application, if any application at all:

> The statute uses the phrase "improperly or collusively" to characterize the manufacture or joinder prohibited by it. The word "collusion" is a strong one. The term "collusion" indicates "A secret agreement and cooperation for a fraudulent or deceitful purpose; deceit; fraud." Webster's New International Dictionary, 2 ed. . . . Certainly to make use of state law to obtain diversity jurisdiction even though the object may be a high verdict in federal court is not collusive within the ordinary meaning of that term. Moreover, the word "collusion" generally is employed to indicate an illegal agreement or understanding between opposing sides of a litigation rather than to an arrangement effected by one side of the sort at bar. Here the plaintiff's side of the case acted for what it deemed to be its own benefit and was opposed heartily by the other party to the litigation. The terms "improper" or "improperly", according to Webster's mean "Not

> suited to the circumstances, design, or end; not appropriate, fit, or congruous; as an *improper* medicine; *improper* dress." Webster gives as synonyms: "Improper, indecent, unseemly, indecorous, unbecoming, indelicate." The word "improperly" clearly connotes impropriety. We cannot perceive that here. Had Congress intended to prohibit the creation of federal diversity jurisdiction under such circumstances as those at bar it could have done so simply by omitting the words "improperly or collusively".

264 F.2d, at 788. By focusing on the literal meanings of the two words, the court virtually emasculated the statute; for it is doubtful that any of the cases under consideration reflect collusion in the sense of fraud or deceit, collusion with the opposing party, or impropriety in the sense of indecorum or indecency. Indeed, when litigants can achieve diversity by such simple devices as assignment to a nonresident collection agent or appointment of a nonresident administrator, it is hard to imagine why they would ever resort to fraud or deceit, actual impropriety, or collusion with the other side. If the statute is to have any utility, its meaning must be derived from the prerevision statutes and cases, not from dictionary definitions of the individual words. In the context of Section 1359 and its predecessor statutes, the phrase "improperly or collusively" means what the courts have said it means. Hence, an attempt to create

federal jurisdiction by colorable assignment or other device without substance is "improper or collusive" within the meaning of the statute. This principle is settled by prerevision cases and remains the law today.[5]

Like *Corabi, City of Eufaula, Alabama v. Pappas, supra,* evinces a restrictive view of Section 1359. In that case, the city instituted condemnation proceedings against a piece of land owned jointly by the members of a large family. The members who lived in Alabama transferred their interests to Zafero P. Paterson, the one member of the family who lived in another state. The consideration was $1.00, and it was conceded that the purpose of the transfer was to create diversity jurisdiction. Though there was no instrument requiring him to do so, it was understood that Paterson would share any sum he recovered in

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[5] Cases like *Corabi* have prompted Professor Wright to observe that Section 1359 "has been largely ineffective." Wright, *Federal Courts* § 31, at 86 (1963 ed.). To remedy this situation, the American Law Institute has proposed two new sections for the Judicial Code. One of these would attribute the same citizenship to an executor or administrator as the decedent, thus making it impossible to create diversity by appointment of a nonresident. ALI *Study of the Division of Jurisdiction Between State and Federal Courts* § 1301(b)(3) (April 1964 Draft). Section 1309(b) of the same Draft would clearly prohibit assignments or other transfers designed to create diversity jurisdiction:

> Whenever an object of a sale, assignment, or other transfer of the whole or any part of any interest in a claim or any other property has been to enable or to prevent the invoking of jurisdiction under this chapter or chapter 158 of this title, jurisdiction of a civil action shall be determined as if such sale, assignment or other transfer had not occurred. The word "transfer" as used in this section includes the appointment of a trustee, receiver, or other fiduciary, or of any other person to hold or receive interests of any kind, whether made by private persons or by a court or any other official body.

the suit with his transferors.[6] Despite the fact that he was clearly acting as the family's collection agent in federal court and had not received an absolute assignment of the other interests, the district court sustained jurisdiction, reasoning that a contract supported by $1.00 consideration is valid under Alabama law and that the motive to create federal jurisdiction is immaterial. We are unable to distinguish this case from the one before us, but we choose not to follow it. The assignment was colorable in the sense that it did not divest the assignors of their interests in the lawsuit, and it was made for the purpose of creating diversity. In our opinion, the decision upholding jurisdiction under these circumstances represents an unjustified departure from pre-revision cases decided by the Supreme Court and serves to undermine the historic policy of limiting diversity jurisdiction.[7]

As we are firmly convinced that the court below had no jurisdiction over the subject matter, we need

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[6] There appears to be no material distinction between this case and the instant case, but there is the minor distinction that Paterson did not execute a separate instrument stating that each member of the family would share in the recovery to the extent of his interest in the land. The parties simply had an understanding to this effect. The question arises whether we would decide the instant case differently if Kramer had not executed the instrument of reassignment. If it still appeared from all the facts that he was merely a collection agent and that the assignment was not real and absolute, then the result would, of course, be the same.

[7] In *Ferrara v. Philadelphia Laboratories, Inc.*, D. Vermont 1967, 272 F. Supp. 1000, a case involving an assignment of personal-injury claims to a nonresident trustee for the purpose of creating diversity, Judge Leddy discusses in a very thorough fashion the same decisions we have discussed in relation to Section 1359 and reaches substantially the same conclusions about them. The motion to dismiss for want of jurisdiction was granted.

not proceed to the merits of the controversy. The judgment of the district court is REVERSED and the cause REMANDED to that court with directions to dismiss for want of jurisdiction.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24090

D. C. Docket No. CA 3-1168

CARIBBEAN MILLS, INC.,

Appellant,

versus

CLAYTON S. KRAMER,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and BELL and THORNBERRY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court with directions to dismiss for want of jurisdiction in accordance with the opinion of this Court.

It is further ordered and adjudged that the appellee, Clayton S. Kramer, be condemned to pay the costs of this cause

in this Court for which execution may be issued out of the said District Court.

January 26, 1968.

Court Costs:
Docketing cause, etc. . .$25.00
Cost of Printing
Record 1455.00
Total $1480.00

Issued as Mandate:
MAR 13 1968